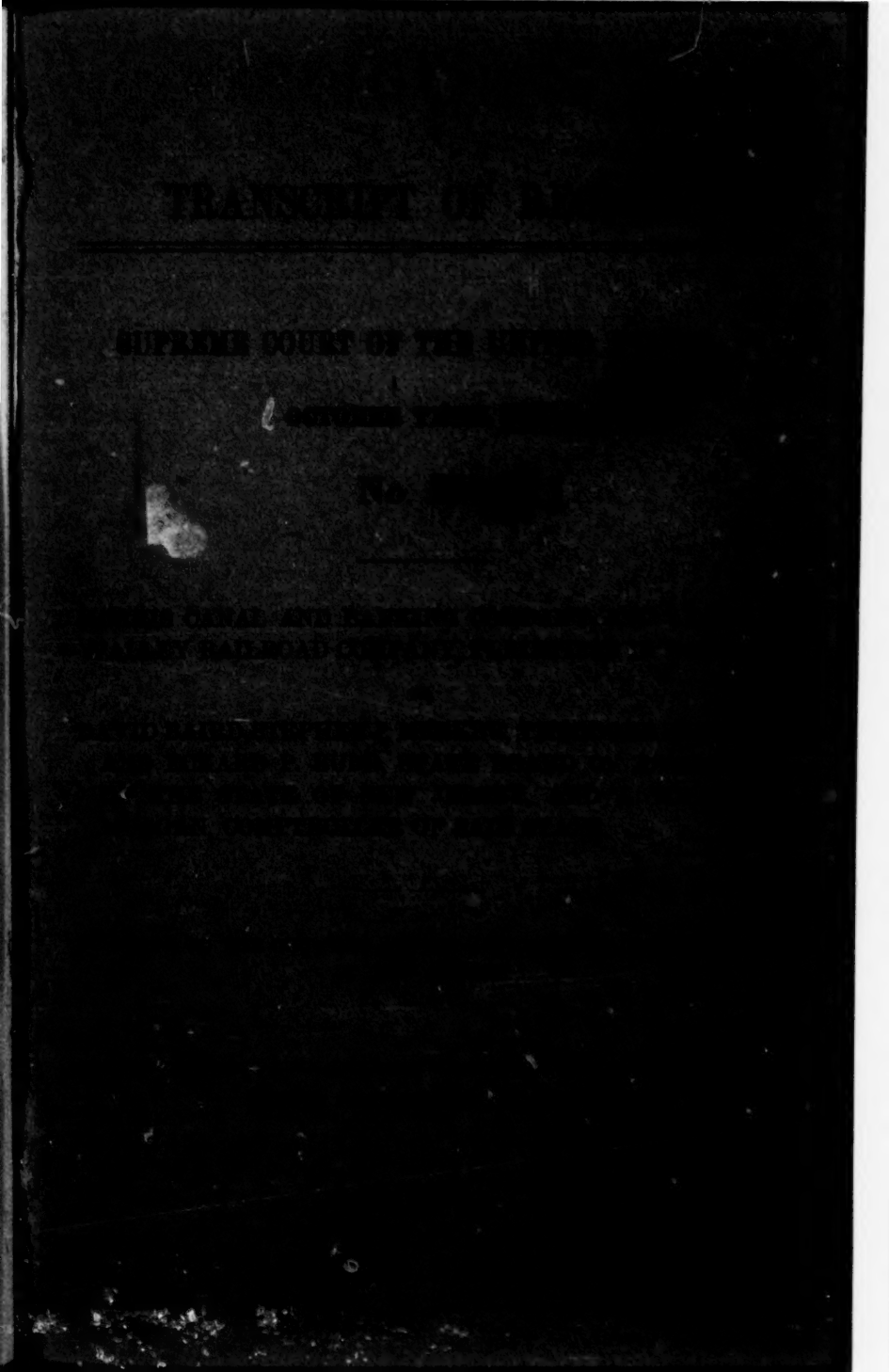


(21,462)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 124.

MORRIS CANAL AND BANKING COMPANY AND LEHIGH VALLEY RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

DAVID BAIRD, STEPHEN J. MEEKER, THEODORE STRONG, AND ECKARD P. BUDD, STATE BOARD OF ASSESSORS OF THE STATE OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

INDEX.

	Original.	Print
Caption	*a*	1
Record from supreme court	1	1
Writ of error	1	1
Return to writ of error	2	2
Rule for judgment	3	2
Allegation of diminution	4	3
Certiorari for outbranches of record	5	3
Return to certiorari for outbranches of record	6	4
Order to file printed copy of testimony	7	4
Writ of certiorari	8	5
Return of State board of assessors	11	6
Schedule A—Notice of assessment, November 1, 1906	13	8
Schedule B—Certificate of assessment	18	10
Comptroller's return	19	11
Schedule – Certificate of assessment	20	11
Reasons	21	12
Depositions, &c.	25	15
Offers of exhibits, &c.	25	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 21, 1910.

	Original.	Print.
Testimony of Wm. I. Powers	27	16
Testimony of Peter H. Burnett	34	21
Exhibits of Morris Canal and Banking Company	44	27
Charter of Morris Canal and Banking Company	44	27
Supplement to charter (1824, 1828)	53	32
Amendatory act of 1829	55	34
Amendment to charter (1830)	57	35
Supplement to charter (1835)	59	36
Amendment to charter (1836)	59	36
Supplement to charter (1849)	61	37
Certificate of acceptance of supplement to charter of 1849	63	38
Lease of basin (1867)	67	41
Act of 1871, authorizing lease	69	42
Supplement to charter (1873)	72	44
Bridge act of 1879	73	44
P 1—Lease to Lehigh Valley Railroad Co. (1871)	74	44
P 2—Return affidavit, protest, and statement (1888)	82	50
P 3—Return, appeal, and protest (1889)	90	55
P 4—Return and protest (1896)	90	55
P 5—Map showing property, &c., of Easton and Amboy Railroad	90	55
P 6—Map of Jersey City terminal	91	56
P 7—Map showing Oak Island yard	91	56
P 8 -Return and appeal (1906)	91	56
Concurrent resolution (1903)	93	57
Extract from report of commissioners appointed under concurrent resolution of 1903	94	58
Joint resolution (1906)	95	58
Exhibits of defendants	96	59
Mortgage by Morris Canal and Banking Company to William Willink, Jr	96	59
Statement of court proceedings on foreclosure of Willink mortgage	96	59
Interlocutory decree	97	59
Decree of affirmance	99	61
Master's deed (1844)	100	61
Master's return to execution	108	66
Opinion	110	67
Assignment of errors	111	68
Joinder in error	115	70
Check list	116	71
Opinion	117	71
Judgment	121	74
Petition for writ of error	123	75
Assignment of errors	127	76
Order allowing writ of error	130	77
Bond on writ of error	132	78
Clerk's certificate as to bond	135	81
Writ of error	136	82
Clerk's certificate as to writ of error	140	83
Return to writ of error	141	83
Citation and service	142	84

a New Jersey Court of Errors and Appeals.

MORRIS CANAL AND BANKING COMPANY and LEHIGH VALLEY RAILROAD COMPANY, Lessee (Prosecutors), Plaintiffs in Error,
vs.
DAVID BAIRD et als., State Board of Assessors, etc., et al., (Defendants), Defendants in Error.

In Error to Supreme Court. (Certiorari.)

Case.

Collins & Corbin, Attorneys of (Prosecutors) Plaintiffs in Error.
Robert H. McCarter, Attorney General, Attorney of (Defendants) Defendants in Error

1 *Writ of Error.*

(Tested February 26, 1908.)

NEW JERSEY, *ss:*

The State of New Jersey to our Justices of our Supreme Court, Greeting:

[SEAL.]

Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our said Supreme Court before you between the Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, prosecutors, and David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State, defendants, on a certiorari issued out of our said Supreme Court to the said David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors as aforesaid, and J. Willard Morgan, Comptroller as aforesaid, directed as is said, manifest error hath intervened, to the great damage of the said Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, prosecutors as aforesaid, as by their complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given then you send distinctly and openly, under your seal, the records and proceedings and plaint aforesaid, with all things touching and concerning the same to our Court of Errors and Appeals, before the judges thereof, on the sixteenth day of March, A. D., 1908, and this writ, that the
2 records and proceedings aforesaid being inspected we may cause to be further done thereupon what of right and according to law ought to be done.

Witness, Honorable Mahlon Pitney, our chancellor and president judge of our said Court of Errors and Appeals at Trenton, aforesaid, the twenty-sixth day of February, in the year of our Lord, one thousand, nine hundred and eight.

S. D. DICKINSON, *Clerk.*

COLLINS & CORBIN, *Attorneys.*

Return to Writ of Error.

(Filed March 4, 1908.)

The answer of the justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said state, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, *C. J.* [SEAL.]

3 *Rule for Judgment.*

(Entered February 13, 1908.)

New Jersey Supreme Court.

MORRIS CANAL AND BANKING COMPANY et al., Prosecutors,
vs.
DAVID BAIRD et als., State Board of Assessors, et al., Defendants.

On Certiorari.

This matter coming on to be heard at the June term, nineteen hundred and seven, of this court, and the court having inspected the record and heard the arguments of counsel;

It is ordered, that the tax brought up by the writ of certiorari herein, be and the same is hereby affirmed and the said writ of certiorari dismissed, with costs.

Entered, February 13th, 1908, on motion of

ROBERT H. McCARTER,
Attorney General.

I, William Riker, Jr., clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule made by said court in the above stated cause and entered in the minutes thereof.

In testimony whereof I have set my hand and the seal of said court at Trenton, this twenty-eighth day of February, A. D., nineteen hundred and eight.

[SEAL.] WM. RIKER, *Clerk.*

4 *Allegation of Diminution.*

(Filed March 5, 1908.)

New Jersey Court of Errors and Appeals.

MORRIS CANAL AND BANKING COMPANY and LEHIGH VALLEY RAILROAD COMPANY, Lessee, Plaintiffs in Error,

vs.

DAVID BAIRD et als., State Board of Assessors, et al., Defendants in Error.

In Error.

Afterwards, that is to say, on the fourth day of March, A. D., 1908, before the judges of the said Court of Errors and Appeals in the last resort in all causes, at Trenton, comes the said Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, by Collins and Corbin, their attorneys, and allege that the writ of certiorari and returns made thereto in the Supreme Court, the reasons filed thereon, testimony taken and exhibits offered therein, the opinion of the justices of the Supreme Court and other papers in relation to the judgment and record aforesaid are not certified and returned with the writ of error depending in this court.

And the said Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, pray that the writ of the State of New Jersey be directed to the justices of the said Supreme Court to certify to the said Court of Errors and Appeals the truth of the same, and it is granted to it.

COLLINS & CORBIN,
Attorneys for and of Counsel with Plaintiffs in Error.

5 *Certiorari for Outbranches of Record.*

(Tested March 5, 1908.)

NEW JERSEY, *ss:*

The State of New Jersey to the justices of our Supreme Court, Greeting:

[SEAL.]

Whereas, on the return of the writ of error to you directed in a certain cause wherein Morris Canal and Banking Company, and Lehigh Valley Railroad Company, lessee, are plaintiffs in error, and David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State, are defendants in error,

diminution of the record is alleged on the part of the plaintiffs i
error.

Now, therefore, we being willing to be certified of the writ o
certiorari on which the judgment removed by said writ of erro
was recovered and returns made thereto in our Supreme Court, th
reasons filed thereon, testimony taken and exhibits offered therei
the opinion of the justices of the Supreme Court, and other pape
in said court in relation to the judgment and record aforesaid, d
hereby command you that to the Court of Errors and Appeals i
the last resort in all causes on the fourteenth day of March, 1908
the said writ of certiorari, returns, reasons, testimony and exhibit
opinion, and other papers in said Supreme Court in relation t
said judgment and record, with all things touching the same, yo
do certify and send, together with this writ, that therein may b
done what of right and according to the constitution and laws o
the state ought to be done.

6 Witness, Mahlon Pitney, Esquire, chancellor and presiden
judge of our said Court of Errors and Appeals at Trento
aforesaid this fifth day of March, nineteen hundred and eight.

S. D. DICKINSON, *Clerk.*

COLLINS & CORBIN, *Attorneys.*

Return to Certiorari for Outbranches of Record.

(Filed March 14, 1908.)

I do herewith send to the Court of Errors and Appeals of th
State of New Jersey, the proceedings as within commanded unde
the seal of the Supreme Court of the State of New Jersey and m
hand, dated, March 14th, 1908.

[SEAL.] WM. RIKER, JR., *C.*

7 *Order to File Printed Copy of Testimony, &c.*

(Entered March 11, 1908.)

New Jersey Supreme Court.

MORRIS CANAL AND BANKING COMPANY and LEHIGH VALLEY RAIL
ROAD COMPANY, Lessee, Prosecutors,

vs.

DAVID BAIRD et als., State Board of Assessors, etc., et al., Defendants

On Certiorari.

It appearing that the testimony used in this case was taken b
stipulation of the parties and filed in a similar case prosecuted by th
United New Jersey Railroad and Canal Company and Pennsylvani
Railroad Company, lessee, against the same defendants, and in thi
court the testimony as filed in that case was used in the argumen

of this case, being taken to apply to both; and, it appearing that the said testimony has been printed, the same being entitled not only in this case but in said case prosecuted by the United New Jersey Railroad and Canal Company and Pennsylvania Railroad Company, lessee:

8 It is ordered, that a printed copy of said testimony, or so much thereof as was taken in this case, be filed herein, and that the clerk of this court may return the same as part of the outbranches of the record in this case, to the Court of Errors and Appeals, in response to the writ of certiorari issued from that court for the outbranches of the record in this court.

Granted in open court.

WM. S. GUMMERE, *C. J.*

Entered, March 11, 1908, on motion of Collins & Corbin, Attorneys.

Writ of Certiorari.

(Tested January 26, 1907.)

NEW JERSEY, *To wit:*

The State of New Jersey to David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and to J. Willard Morgan, Comptroller of said State, Greeting:

[SEAL.]

We being willing, for certain reasons (a proper case having been made, and due notice of application for this writ having been given to the Attorney General), to be certified of the valuation, assessment and tax for the year 1906, made pursuant to "An act to revise and amend an act for the taxation of railroad and canal property" approved April 10th, 1884, which revision and amendment was approved March 27th, 1888, and the acts amendatory thereof and supplementary thereto, on all the main stem and franchises

9 and tangible personal property of the Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, do demand you that the said valuation, assessment and tax, the statement or statements thereof certified and reported by said board to the Comptroller of the State of New Jersey, for the year 1906, and return made by the said company to your board, pursuant to the said acts, together with the statements or schedules accompanying the same, pursuant to the said acts, the written complaint made by said company specifying their grievances by reason of such valuation, assessment and tax, the evidence and statements taken upon the review of said valuation and assessment and tax, and the final determination of said board, upon such review, and all corrections made by them in said valuation, assessment and tax, and the certificate made by said board to the said Comptroller upon such review and final determination and also all certificates returned to and filed with said board by the assessors of the several taxing

districts of the state and any and all other evidence and informatio used by said board in ascertaining the average rate of taxation o $1.801 per $100 valuation, fixed by said board, together with all pr ceedings and other matters touching and concerning the same, a fully as the same remain before you, or any of you, or under you control, you certify and send to the justices of our Supreme Cour at Trenton, on the eleventh day of February next, together with th writ, that we may cause to be done touching the same what of righ should be done.

Witness, Hon. William S. Gummere, Chief Justice, at Trento this twenty-sixth day of January, nineteen hundred and seven.

WM. RIKER, JR., *Clerk.*

COLLINS & CORBIN,
Attorneys of Prosecutor.

10 (Endorsement.)

New Jersey Supreme Court.

MORRIS CANAL AND BANKING COMPANY et al., Prosecutors,
vs.
DAVID BAIRD, STEPHEN J. MEEKER, THEODORE STRONG, and ECKAR P. BUDD, State Board of Assessors, &c., et al., Defendants.

Writ of Certiorari.

Returnable February 11th, 1907.

COLLINS & CORBIN,
Attorneys for Prosecutors, 243 *Washington St.,*
Jersey City, N. J.

I allow this writ. Let it be sealed.

On terms that the prosecutor move the argument at the Februar term, 1907; that the reasons be filed and served by prosecutor o on or before the return day and that the prosecutor pay or tend to the state treasurer on or before the return day of the writ a su equal to one-half of one per cent. upon the valuation fixed for th year 1906 by the State Board of Assessors upon the main stem franchises and tangible personal property of the prosecutor.

WM. S. GUMMERE, *C. J.*

11 *Return of State Board of Assessors.*

(Filed February 11, 1907.)

To the Chief Justice and the Associate Justices of the Supreme Cou of the State of New Jersey:

David Baird, Stephen J. Meeker, Theodore Strong and Eckard P Budd, constituting the State Board of Assessors, and hereinafte referred to as such, pursuant to the commands of the writ of ce

tiorari hereunto attached and for their return thereto, do certify as follows:

I. That pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An act to revise and amend 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four" (which revision and amendment was approved March 27, 1888), and the several acts amendatory thereof and supplementary thereto, the State Board of Assessors did, on the first day of November, in the year nineteen hundred and six, value and assess for taxation for the year nineteen hundred and six (1906) the property of the prosecutor, the Lehigh Valley Railroad Company, lessee of the Morris Canal and Banking Company, described in Schedule A, hereunto annexed and made a part hereof, consisting of the waterway and franchise of its canal and its tangible personal property necessary for and used in state commerce, and did compute, assess and impose a tax upon the assessed valuation of said property, for state uses, at the rate of $1.801 per hundred dollars of valuation, as computed and determined by the board in the manner provided by Chapter 82 of the Laws of 1906. The amount of said valuation, assessment and tax are set forth in said Schedule A.

In making such valuation and assessment said Board of As-
12 sessors included in the waterway of the prosecutor's canal only the waterway, towing-path and berme bank, not exceeding one hundred feet in width, and all structures erected thereon and used in connection therewith—not including, however, any passenger or freight buildings erected thereon.

II. That on said first day of November, nineteen hundred and six, pursuant to the statutes aforesaid, the said State Board of Assessors did certify and report in writing to the Hon. J. Willard Morgan, Comptroller of the State of New Jersey, a statement of said valuation, assessment and tax, as will more fully appear by a copy thereof hereto annexed and made a part hereof, and marked Schedule B.

III. That on said November 1st, 1906, said State Board of Assessors gave notice to the prosecutor of the said valuation, assessment and tax, and that it would meet on the third Monday in November, at the State House in Trenton, for the purpose of reviewing said assessment; that the prosecutor appeared according to said notice, filed a written complaint specifying its grievance against the said valuation, assessment and tax, and protested against the levy and assessment of said tax, and was heard thereon, whereupon the State Board of Assessors, after due consideration, confirmed the said assessment, valuation and tax, and so certified to said the Comptroller.

Dated Trenton, N. J., February 11th, 1907.

DAVID BAIRD,
S. J. MEEKER,
THEODORE STRONG,
ECKARD P. BUDD,
State Board of Assessors.

IRVINE E. MAGUIRE,
Secretary.

13 SCHEDULE A.

State of New Jersey.

Department State Board of Assessors.

TRENTON, N. J., *November* 1st, 1906.

To the Lehigh Valley Railroad Company, Lessee of the Morris Canal *and Banking Company:*

In pursuance of the provisions of an act entitled "An act to revise and amend an act for the taxation of railroad and canal property, approved April tenth, one thousand eight hundred and eighty-four" (which revision and amendment was approved March 27th, 1888), and the acts amendatory and supplementary thereto, the State Board of Assessors herewith transmit to you a statement of the valuation of your property subject to taxation for state uses under the supplemental act, approved April 5th, 1906 (Chap. 82, P. L. 1906), together with the amount of tax assessed thereon.

You are notified that the State Board of Assessors will meet at the State House, in Trenton, N. J., on Monday, the nineteenth day of November, 1906, at eleven o'clock in the forenoon, for the purpose of reviewing their assessment, as directed by the following provisions of the act of March 27th, 1888.

12. *And be it enacted*, That the said State Board of Assessors shall meet on the third Monday of November, at the State House, in Trenton, for the purpose of reviewing their assessment, and may adjourn from time to time till they shall have finished the hearing: upon the written complaint of any company or person considering itself or himself aggrieved, and specifying the grievance, or of the attorney general or of any member of the board, on behalf of the state, that the property of any company is assessed too low, either in the whole or in any taxing district, or that property has
14 been omitted, they shall review the said assessment and correct the same as shall appear just; the Attorney General shall attend such meetings of said board in person or by deputy; no complaint that any company or person is assessed too low, or that any property has been omitted, shall be acted upon until the company or person so assessed shall be notified of such complaint by five days' notice, to be served on such company or person by leaving the same at the office of such company or at the usual place of abode of such person, if a resident of this state; the board shall have the power to issue subpœnas and examine witnesses and call for the production of books and papers, and they shall be entitled to use their personal knowledge and judgment as to the value of property; they shall certify to the comptroller of the state all corrections which they shall make in any assessment; the proceedings provided for by this section shall be completed before the fifteenth day of January, following the making of said assessment, and all com-

plaints must be presented on or before the third Monday of November, or shall be deemed to have been waived.

DAVID BAIRD, *President;*
S. J. MEEKER,
THEODORE STRONG,
ECKARD P. BUDD,
State Board of Assessors.

15 State of New Jersey.

Department State Board of Assessors.

Lehigh Valley R. R. Co., Lessee of the Morris Canal & Banking Co.

Measurement of Water-way for the Year 1906.

	Miles.
Length of water-way in New Jersey	106.480

Length of Water-way in Taxing Districts.

Taxing District.	Length in Miles.
Hudson Co.	
Jersey City	7.600
Kearny, Town of	1.300
Essex Co.	
Newark City	7.000
Belleville Twp.	.530
Bloomfield, Town of	4.600
Passaic Co.	
Acquackanonk Twp	3.750
Paterson City	1.950
Little Falls Twp.	3.500
Wayne Twp.	3.000
Morris Co.	
Pequannock Township	2.100
Montville "	4.720
Boonton "	3.150
Rockaway "	6.433
Rockaway Borough	1.117
Dover, Town of	2.260
Randolph Township	1.264
Wharton Borough	1.826
16 Roxbury Township	9.208
Roxbury Township (Lake Hopatcong Feeder)	.500
Netcong Borough	.492
Mount Olive Township	5.250
Passaic Co.	
Wayne Twp. (Pompton Feeder)	3.609

Sussex Co.	
Stanhope Borough	.473
Byram Township	1.057
Warren Co.	
Independence Township	4.200
Mansfield "	8.100
Washington "	3.800
Washington Borough	1.000
Franklin Township	5.500
Greenwich "	2.800
Lopatcong Twp.	2.222
* Lopatcong Twp. (Phillipsburg, Town of)	.303
Phillipsburg, Town of	1.875
Total miles	106.48

*Dividing line between Taxing Districts.

17 State of New Jersey.

Department State Board of Assessors.

Lehigh Valley R. R. Co., Lessee of the Morris Canal & Banking Co.

Valuation and Assessment for State Uses for the Year 1906.

Valuation.

Assessed valuation of the Morris Canal for water-way and franchise	$2,781,000.00
Assessed valuation of tangible personal property for and used in state commerce	63,046.00
Total assessable for state uses	$2,844,046.00

Tax.

Tax for state uses, at average tax rate of $1.801 per $100 valuation	$51,221.27

18 SCHEDULE.

State of New Jersey.

Department State Board of Assessors.

To the Hon. J. Willard Morgan, Comptroller of the State of New Jersey:

In pursuance of the provisions of an act entitled "An act to revise and amend an act for the taxation of railroad and canal property,

approved April tenth, one thousand eight hundred and eighty-four" (which revision and amendment was approved March 27th, 1888), and the acts amendatory and supplementary thereto, we, the State Board of Assessors, hereby certify and report to you the following statement of the assessed valuation of the Lehigh Valley Railroad Company, Lessee of the Morris Canal and Banking Company, as provided by the supplemental act, approved April 5th, 1906 (Chap. 82, P. L., 1906), and the amount of tax payable by said company for state uses, for the year 1906:

Assessed valuation of the Morris Canal for water-way and franchise	$2,781,000.00
Assessed valuation of tangible personal property necessary for and used in state commerce	63,046.00
Total assessable for state uses	$2,844,046.00
Tax for state uses, at average tax rate of $1.801 per $100 valuation	$51,221.27

DAVID BAIRD, *President;*
S. J. MEEKER,
THEODORE STRONG,
ECKARD P. BUDD,
State Board of Assessors.

19 *Comptroller's Return.*

(Filed February 11, 1907.)

To the Chief Justice and the Associate Justices of the Supreme Court of the State of New Jersey:

I, J. Willard Morgan, Comptroller of the Treasury of the State of New Jersey, do hereby certify and send as within I am commanded, in the schedule hereunto annexed, the statement of the valuation, assessment and tax for nineteen hundred and six (1906) upon all the main stem and franchise and tangible personal property of the Lehigh Valley Railroad Company, lessee of the Morris Canal and Banking Company, and the final determination of the State Board of Assessors, thereon as the same remain in my office.

Witness my hand and seal, at Trenton, the eleventh day of February, nineteen hundred and seven.

J. WILLARD MORGAN,
Comptroller of the Treasury.

20 State of New Jersey.

Department State Board of Assessors.

To the Hon. J. Willard Morgan, Comptroller of the State of New Jersey:

In pursuance of the provisions of an act entitled "An act to revise and amend an act for the taxation of railroad and canal prop-

erty, approved April tenth, one thousand eight hundred and eighty-four," (which revision and amendment was approved March 27th, 1888), and the acts amendatory and supplementary thereto, we, the State Board of Assessors, hereby certify and report to you the following statement of the assessed valuation of the Lehigh Valley Railroad Company, lessee of the Morris Canal and Banking Company, as provided by the supplemental act, approved April 5th, 1906 (Chap. 82, P. L. 1906), and the amount of tax payable by said company for state uses for the year 1906.

Assessed valuation of the Morris Canal for water-way and franchise	$2,781,000.00
Assessed valuation of tangible personal property necessary for and used in state commerce	63,046.00
Total assessable for state uses	$2,844,046.00
Tax for state uses, at average rate of $1.801 per $100 valuation	$51,221.27

Appealed.
Assessment confirmed.

DAVID BAIRD, *President;*
S. J. MEEKER,
THEODORE STRONG,
ECKARD P. BUDD,
State Board of Assessors.

21 *Reasons.*

(Filed February 13, 1907.)

New Jersey Supreme Court.

MORRIS CANAL AND BANKING COMPANY and LEHIGH VALLEY RAILROAD COMPANY (Lessee), Prosecutors,
vs.
DAVID BAIRD et als., State Board of Assessors, et al., Defendants.

On Certiorari.

The prosecutor writes down the following reasons for setting aside the valuation, assessment and tax for the year nineteen hundred and six, brought before this honorable court by the writ of certiorari in this cause:

First. Because the act entitled "An act to revise and amend 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," approved March twenty-seventh, eighteen hundred and eighty-eight and the several supplements thereto and acts amendatory thereof, under and in pursuance of which the said valuation, assessment and tax were made, levied and imposed, and all the proceedings of the State Board of

Assessors in the making, levying and imposing said valuation, assessment and tax, are unconstitutional, illegal and void.

Second. The said act of March 27th, 1888, as amended, under which the said assessments for taxes was levied, is void, because it provides for an arbitrary segregation of a part of that class
22 of property distinguished as "property used for railroad and canal purposes," and requires that such segregated part be assessed for taxes by a special law, and by rules differing from the rules prescribed for the assessment of all other property of said class, in violation of Paragraph 12 of Section 7 of Article IV. of the Constitution of the State of New Jersey, which requires that property shall be assessed for taxes under general laws and by uniform rules.

Third. The supplements passed in the year 1906 to the said act of March 27th, 1888, to wit, Chapters 82, 122 and 280 of the Laws of 1906, are void because they destroyed the classification of property for taxes theretofore existing under said act of March 27th, 1888, which class was distinguished as "property used for railroad and canal purposes," and set up a special law and different rules for the assessment for taxes of a part of said class of property, in violation of Paragraph 12 of Section 7 of Article IV. of the Constitution of the State of New Jersey, which requires that property shall be assessed for taxes under general laws and by uniform rules.

Fourth. Because the said act of March twenty-seventh, eighteen hundred and eighty-eight, and the several supplements thereto and acts amendatory thereof, and the method in which the same have been applied by the said State Board of Assessors, and the said valuation, assessment and taxes are in violation of Paragraph 12 of Section 7 of Article IV. of the Constitution of the State of New Jersey, which provides that property shall be assessed for taxes under general laws and by uniform rules, according to its true value: and are also in violation of the first section of the Fourteenth Article of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

23 Fifth. Because the said act of March twenty-seventh, eighteen hundred and eighty-eight, and the said supplements thereto and acts amendatory thereof, provide a scheme for the valuation, assessment and taxation of property used for railroad and canal purposes by rules which are not uniform, contrary to Paragraph 12 of Section 7 of Article IV. of the Constitution of the State of New Jersey.

Sixth. Because the said act of March twenty-seventh, eighteen hundred and eighty-eight, and the said supplements thereto and acts amendatory thereof, provide a scheme for the valuation, assessment and taxation of property used for railroad and canal purposes not according to its true value, contrary to Paragraph 12 of Section 7 of Article IV. of the Constitution of the State of New Jersey.

Seventh. Because the said act of March twenty-seventh, eighteen hundred and eighty-eight and the supplements thereto and acts

amendatory thereof, under which the said valuation, assessment and tax were made, levied and imposed, are special and not general, contrary to said Paragraph 12 of Section 7 of Article IV. of the Constitution of the State of New Jersey.

Eighth. Because, in valuing, assessing and taxing the main stem, tangible personal property and franchises of the prosecutor, the said State Board of Assessors adopted a basis or principle and ascertained and applied a rate, which are unconstitutional, illegal and unjust.

Ninth. Because the said act of March twenty-seventh, eighteen hundred and eighty-eight, and the said several supplements thereto and acts amendatory thereof, and the levy and assessment of the tax thereunder by the State Board of Assessors, brought up by this writ, impose an arbitrary tax upon the property of the prosecutor, without regard to the necessities of the state and in excess of the needs of the state.

24 Tenth. Because the said valuation, assessment and tax are in divers other respects excessive, unequal, unconstitutional, illegal and unjust.

Eleventh. Because the property of the prosecutor brought up by these proceedings is possessed, occupied and used by the prosecutor for the actual and necessary purposes of canal navigation under its charter, and is exempt from taxation by virtue of the provisions of the following acts:

1. An act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers, passed December 31st, 1824.

2. An act to authorize the Morris Canal and Banking Company to extend the Morris Canal to the waters of the Hudson, passed January 26th, 1828, and the acts amendatory and supplementary to said acts.

Which said acts and the acceptance thereof by the prosecutor, constitute an irrepealable contract between the State of New Jersey and the prosecutor, whereby the prosecutor's property brought up by these proceedings, is exempt from taxation, as in the fourth section of said first mentioned act of December 31st, 1824, explicitly provided; and the said act of the Legislature of New Jersey, passed March 27th, 1888, and the supplements thereto and acts amendatory thereof, are void as far as they affect the prosecutor and its said property, because they impair the obligation of the said irrepealable contract of exemption from taxation, in violation of Paragraph 3 of Section 7 of Article IV. of the Constitution of the State of New Jersey, and of Paragraph 1 of Section 10 of Article I. of the Constitution of the United States.

Dated, February 11th, 1907.

COLLINS & CORBIN,
Attorneys of Prosecutor.

Service of a copy of the within reasons acknowledged this 11th day of February, 1907.

ROBERT H. McCARTER, *Att'y Gen'l.*

25 *Depositions.*

Office of the Attorney General of the State of New Jersey.

TRENTON, N. J., TUESDAY, *Feb. 19th*, 1907.

Pursuant to adjournment the counsel for the respective parties met at the office of the Attorney General, State House, Trenton, N. J., on Tuesday the 19th day of February, 1907, at 11:30 o'clock A. M., and the taking of depositions on the part of the prosecutors was resumed under the various stipulations and agreements heretofore appearing in the record.

Mr. CORBIN: I offer in evidence the following statutes and documents:

The charter of the Morris Canal and Banking Company, being an act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers, passed December 31st, 1824.

Pamp. Laws, N. J., 1842, p. 158.

A supplement to said charter, passed December 31st, 1824.

Pamp. Laws, 1824, p. 157.

An act to authorize the Morris Canal and Banking Company to extend the Morris Canal to the waters of the Hudson, passed January 26, 1828.

Pamp. Laws, p. 43.

An act to authorize the Morris Canal and Banking Company to borrow money and for other purposes, passed February 23, 1829.

Pamp. Laws, 1829, p. 86.

An amendment to the charter, passed January 28, 1830.

Pamp. Laws, p. 17.

26 A further supplement to the charter of the Canal Company, passed January 19, 1835.

Pamp. Laws, p. 17.

A further supplement to the charter of the Canal Company, passed March 5, 1836.

Pamp. Laws, p. 262.

A further supplement to the charter of the Canal Company, approved February 9, 1849.

Pamp. Laws, p. 33.

Also acceptance of said act, filed June 28, 1849.

A further supplement to the charter of the Canal Company, approved March 14, 1867.

Pamp. Laws, p. 251.

A further supplement to the charter, approved March 14, 1871.

Pamp. Laws, p. 444.

A supplement to the charter of the Canal Company, approved April 2, 1873.

Pamp. Laws, p. 1347.

The lease from the Morris Canal and Banking Company to the Lehigh Valley Railroad Company, dated May 4, 1871, which was marked Exhibit P. 1.

Return of Morris Canal and Banking Company, by Jacob F. Randolph, president to the State Board of Assessors, of property as it existed January 1st, 1888, together with president's affidavit and protest, dated June 1st, 1888, appended thereto, and statement of real estate appended thereto.

Exhibit P. 2.

Returned by Morris Canal and Banking Company with accompanying appeal and protest filed with the State Board of Assessors for the year 1889.

Exhibit P. 3.

27 Mr. CORBIN: This return for 1889 is the same as that for 1888, excepting that for the description of property, and so forth, it refers to the return of 1888. Annual protests and statements have been filed ever since 1889 on exactly the same form, all referring back to that act of 1888 for description.

I now offer the last one filed for the year 1896.

Exhibit P 4.

Mr. CORBIN: Unless the Attorney General wishes, I will not produce the others now.

The ATTORNEY GENERAL: On the statement of counsel that these are specimens of the others, we are entirely satisfied to waive the others.

WILLIAM I. POWERS, a witness produced on behalf the Morris Canal and Banking Company, and the Lehigh Valley Railroad Company, lessee, being duly sworn according to law, testifies as follows:

Direct examination by Mr. CORBIN:

Q. What is your age?
A. Sixty-two.
Q. Where do you live?
A. Boonton, N. J.
Q. What is your occupation?
A. Superintendent of the Morris Canal.
Q. How long have you been superintendent of the Morris Canal?
A. Since April, 1888.
Q. How long have you been in the employ of the canal as superintendent or in any other capacity?
A. Forty-three years.
Q. Were you familiar with the canal before you were in its employ?
A. I was.

Q. How long have you known of the existence of the canal?
28 A. Ever since I can remember; as a boy.
Q. Did you live near it?
A. I was born very close to it.
Q. Then you can remember it for fifty years or over, can you?
A. Fifty years at least.
Q. Do you know anybody living now who can remember the time when it was built?

A. I do not.

Q. Are you familiar with the history of the canal and the tradition of when it was built and so forth?

A. Yes, sir.

Q. When was it built between the Delaware River and the Passaic River?

A. 1827 to 1831; I think it was opened in 1831.

Q. When was it built between the Passaic River and the Hudson River?

A. In 1836.

Q. Has it been in operation ever since you can remember?

A. Yes, sir; during the season.

Q. How long is the season on each year while it is operated?

A. About eight months.

Q. You are familiar with the works of the canal are you—are you familiar with its entire length?

A. I am.

Q. Is any portion of it with its works over one hundred feet wide?

A. Yes, sir.

Q. About how much of the whole length?

ATTORNEY-GENERAL: Objected to as immaterial.

A. At least fifteen miles, I should say.

Q. What is the total length of the canal?

A. One hundred and two miles.

Q. That is the main canal.

A. Yes, sir.

Q. Then there is a navigable feeder besides?

29 A. The Pompton feeder, four miles and the Hopatcong feeder, which I think is about six or seven hundredths of a mile.

Q. How many inclined planes has the canal?

A. Twenty-three.

Q. How many locks for the lifting of boats has it?

A. Thirty-two.

Q. Are those all necessary for the operation of the canal?

A. They are.

Q. At the planes and locks how great a width has the property, with those works pertaining to it; whether one hundred feet or more or less.

A. One hundred feet and more; some places a little less.

Q. Are many of them more?

A. Well, I think so, yes.

Q. The works on these planes that are essential for the lifting of the boats, are they partly within the one hundred feet and partly without?

A. They are some without.

Q. Are there basins for the turning of boats and storing of boats and other purposes along the canal?

A. There are a number of them.

Q. What width does the canal attain at those points?

A. They are all over one hundred feet.
Q. Are there terminal basins at Jersey City and at Phillipsburg?
A. There are.
Q. What width do they attain?
A. One hundred feet or more.
Q. Are they more?
A. Yes, sir; they are more.
Q. Have you repair yards for the boats?
A. We have one boat yard at Phillipsburg.
Q. Are these facilities that you have mentioned necessary for the operation of the canal?
30 A. Yes, sir; they are.
Q. Are these reservoirs adjacent to the canal for the storage of water?
A. Yes, sir.
Q. How big are they?
A. The Stanhope Reservoir is over two hundred acres and the Cranbury Reservoir, at some distance from the canal, is over two hundred acres.
Q. Any others?
A. Bare Pond.
Q. What is the area of that?
A. About sixty acres.
Q. Are those essential to the operation of the canal?
A. They are.
Q. What do you use them for?
A. We use them to store water for navigation purposes.
Q. Have you storage rights in other places?
A. At Lake Hopatcong and Greenwood Lake.
Q. Are those used for the operation of the canal?
A. They are.

Mr. CORBIN: In the Morris Canal and Banking Company case I said I would offer the protest for 1906, which was not here for the moment. I have the original here now from the State Board of Assessors' office, being in the form of an affidavit by E. D. Thomas the president of the Morris Canal and Banking Company made April 30th, 1906, being in the same form as the one of 1889 and the intermediate ones.
Exhibit P. 8.

Cross-examination by Mr. HARDIN:

Q. Were you connected with the Morris Canal and Banking Company when the lease was made to the Lehigh Valley Railroad Company in 1871?
31 A. I was.
Q. Do you recall the transfer of the property to the Lehigh Valley Company?
A. I can remember it, I know nothing about the details.
Q. Is the personal property which was then upon the canal still in existence, boats and so forth?

A. Not our boats.

Q. The personal property described in the lease, "All cars, trucks, boats, scows, dredging machines, tools, implements, apparatus, furniture, mules, horses, cattle, harness, supplies, stores, and movable property of every kind and description," to what extent is the personal property mentioned in that lease, generally described as I have read, still in existence?

A. Generally speaking, I think they are still in existence but not in the same quantity—the same article.

Q. Has not new property been bought in place of the old as it wore out?

A. Well, they built a good many boats after they took the lease and got mules.

Q. Do you know how many boats that remain that were there in 1871?

A. I think very few of the boats.

Q. The boats now used by the canal, in connection with the canal, are chiefly new boats built since that time?

A. Yes, sir.

Q. That is true also of such cars as are used?

A. We have no cars, only the plane cars.

Q. Have they been rebuilt in the meantime?

A. Repaired and rebuilt.

Q. Have you any tugs or scows?

A. No tugs, we have scows.

Q. You have no tugs?

A. No, sir.

Q. Are the scows you have new or old?

32 A. I presume they have all been rebuilt, or built since then.

Q. Have you a dredging machine?

A. We have two.

Q. Are they since the lease?

A. One of them I think, I am not sure about that.

Q. You mean that you are not sure that both are since the lease?

A. I am not sure that one of them is not.

Q. The tools and implements used about the canal have chiefly been acquired since the lease?

A. Well, I presume that there are some tools that are lasting, still in existence.

Q. What for instance?

A. Crowbars and hammers.

Q. The bulk of the tools, however, used about the canal have very likely been replaced by this time?

A. Well, some parts of them have.

Q. The general situation of the canal, as a water way, is about now as it was in 1871?

A. Entirely so.

Q. Has any additional property been acquired since that time?

A. I think not.

Q. Do you understand the distinction between main stem and sec
ond class property?
A. I do not.
Q. Did you have anything to do with the payment of taxes o
this property?
A. I did not.

By Mr. CORBIN:

Q. This equipment that has been spoken of, of boats and horse
and harness and tools and mules, is changing constantly, changin
every year, is it not?
A. We have not the same number of mules we had some year
ago.
Q. I understand you to say you have less boats?
A. Yes, sir.
33 Q. About how many men do you have regularly employe
to operate the canal?
A. During the season we have about 150.
Q. That is for a period of about eight months?
A. Yes, sir; during the remainder of the year we have about 6
or 70, about half the number.
Q. The canal company owns boats of its own, does it not?
A. Yes, sir.
Q. And operates them?
A. Yes, sir.
Q. Is the canal open to other boats as well?
A. Yes, sir; all that come.

By Mr. HARDIN:

Q. When you say the canal company owns boats and operate
them, do you mean to distinguish as between the canal company an
the Lehigh Valley Coal Company, its lessee?
A. Not at all; they are the Lehigh Valley R. R. Co.'s boats.
Q. And the Lehigh Valley R. R. Co. operates the canal?
A. Yes, sir.

Mr. HARDIN: The state offers in evidence a mortgage made by th
Morris Canal and Banking Co., to Wilhelm Willink, Jr., date
March 29th, 1830, to secure the sum of $750,000.

Also the Chancery Record of the foreclosure of that mortgage, th
bill being filed *in* Oct. 20, 1841.

Also the Master's deed under such foreclosure executed and de
livered by Ira C. Whitehead, Master in Chancery, to Benjamin Wi
liamson, Atha Whitehead and John J. Bryant, dated October 21
1844.

34 PETER H. BURNETT, a witness produced on behalf of the Morris Canal and Banking Co., and the Lehigh Valley R. R. Co., lessee, and also on behalf of the Lehigh Valley R. R. Co., of New Jersey, being duly sworn according to law, testified as follows:

Direct examination by Mr. CORBIN:

Q. What is your residence and what is your occupation?
A. I reside in Goshen, N. Y. I am the tax agent and the industrial agent of the Lehigh Valley R. R.
Q. Where are you located?
A. At 143 Liberty St., New York.
Q. That is the office of the company?
A. Yes, sir.
Q. How long have you been in the employ of that corporation?
A. A little over three years.
Q. Are you familiar with their real estate and railroads?
A. Yes, sir.
Q. Have you been over it frequently?
A. Yes, sir.
Q. Have you here any maps of any portion of the property?
A. Yes, sir; I have.
Q. Between what points does the Lehigh Valley R. R. Co., of N. J. extend?
A. The road extends from Phillipsburg to Jersey City, and there is also a line extending from the main line at South Plainfield to Perth Amboy.
Q. Are there branches also?
A. Yes, sir.

Witness produces a map entitled "Map of Perth Amboy showing property, tracks and structures of the Easton and Amboy," dated 1884.

Q. Can you say whether that map exhibits the property of the Lehigh Valley R. R. Co. of New Jersey with substantial correctness?
35 A. Yes, sir.
Q. At Perth Amboy?
A. Yes, sir.
Q. As it is now?
A. Yes, sir; there has been very few changes, with the exception of perhaps a few side tracks.
Q. What does the broad, yellow strip through it indicate?
A. That indicates the main line.
Q. And of what width?
A. One hundred feet.
Q. What are the red lines on the map?
A. Those are the property lines of the railroad company.
Q. Down near the shore and also further up from the end of the map, away from the shore, I see tracks outside of the one hundred feet?

A. Those are tracks used in the operation of the road.
Q. Are they in daily use?
A. Yes, sir.
Q. Are they necessary to its operation?
A. Yes, sir.
Q. For what purpose?
A. For the running of cars and storing of cars and for the general use of the road.

By Mr. VAN SYCKLE:

Q. They are used for drilling sidings, I suppose?
A. They are used mostly in the main operation of the road, through here (indicating). These (indicating) are piers going out here. One is just as important as the other to the road.

Further direct examination:

Q. The extreme east end of the main line, upon what is it located?
A. Pier B.
36 Q. One of the piers?
A. Yes, sir.
Q. How many piers are there there?
A. Six.
Q. Is there any difference in their character?
A. No, they are all the same.
Q. Or their use?
A. All the same.
Q. What are they used for?
A. For the loading of boats with coal.
Q. From the cars to the boats?
A. Yes, sir.
Q. This then is Lehigh Valley coal terminal, is it?
A. Yes, sir.

Mr. CORBIN: I offer this map in evidence and ask that it be marked Exhibit P. 5.

Q. Are you familiar with the tax matters of the Lehigh Valley?
A. Quite well, sir.
Q. This Pier B which is shown here as being within the one hundred feet of the main stem, is that taxed as main stem or as second class property?
A. Main stem.
Q. And the other piers, how are they taxed?
A. They are second class, locally taxed.

Witness produces a map entitled "Jersey City Terminal L. V. R. R. revised general plan, January 1st, 1905" showing the condition of the property.

Q. Does this show your terminal at Jersey City?
A. Yes, sir.
Q. Is the terminal of the Morris Canal also shown upon it?
A. Yes, sir.

Q. What does the broad yellow streak through this map show?
A. That is the main stem; the map is one hundred feet to the inch.
37 Q. The main stem of the Lehigh Valley Railroad Company of New Jersey?
A. Yes, sir.
Q. What do the red lines show in this case?
A. The property lines of the railroad company.
Q. Do I understand that within the red lines is the property of the railroad company?
A. Yes, sir.
Q. In this case on what does the easterly end of the railroad company rest?
A. On the Hudson River.
Q. Is it upon a pier or solid land or what?
A. I think that is upon solid land there; it ends on a pier.
Q. I see in this case that the tracks along by your main stem seem to occupy some two hundred feet solidly instead of one hundred feet?
A. Yes, sir.
Q. Are there tracks on the two hundred feet in width.
A. Yes, sir.
Q. What are they used for?
A. For the main business of the railroad company.
Q. The same as the main stem?
A. Yes, sir.
Q. Is there any difference in the use of the tracks on the different portions of this two hundred foot strip?
A. Very little difference.
Q. What are those diagonal tracks running off to the north?
A. Those are piers?
Q. Are those within the Lehigh Valley property too?
A. Yes, sir.
Q. And they front up on the tide water basin in Jersey City?
A. Yes, sir.
Q. For what purpose do you use them?
38 A. For various purposes, for freight and coal.
Q. To transhipp from rail to water, is it not?
A. Yes, sir.
Q. Have you tracks upon them all?
A. Yes, sir.
Q. At the west end of the map, near the National Docks Railway. I see a large number of tracks there?
A. Yes, sir.
Q. What are they used for?
A. For shifting of cars and changing the eastbound and westbound.
Q. Is the Jersey City delivery also in that part?
A. Yes, sir; it is shown there.
Q. Where is the local delivery of freight in Jersey City by the Lehigh Valley?

A. There is one at Pacific avenue and Grand street; that is, we have a station there.

Q. This yellow strip that you have shown, how is it listed for taxation—by what board?

A. By the State Board of Assessors.

Q. And how is the rest of the property that you have shown?

A. All the rest of the property is locally assessed.

Q. Is this road used for passengers and freight, or for what purpose?

A. It is all freight.

Q. You have no passenger lines running in here?

A. No, sir.

Q. Where does your passenger business go?

A. We come in over the Pennsylvania lines from Newark.

Mr. CORBIN: I offer this map in evidence.

Exhibit P. No. 6.

Q. Have you a map of the tracks where they cross the Hackensack Meadows to the south of Newark?

A. Yes, sir.

39 Witness produces a map entitled "Lehigh Valley Terminal Railway. Oak Island Yard. General location plan. Plan of August, 1899."

Q. Is the Lehigh Valley Terminal Railway there shown one of the constituent corporations of your present company?

A. Yes, sir.

Q. Does that show the location of your property and railroad and tracks cross the meadows?

A. As it is now, yes, sir.

Q. Where is this place?

A. In New Jersey, south of Newark, on the meadows.

Q. Commonly called what?

A. Oak Island.

Mr. HARDIN: What is your terminal point there?

Mr. CORBIN: It goes from Newark Bay to the Pennsylvania line, south of Newark.

Q. Does the yellow line here also indicate the main stem?

A. Yes, sir; one hundred feet.

Q. And the red lines indicate what?

A. The property lines.

Q. I see up at the westerly end of your line, near the Pennsylvania Railroad, while you have a uniform strip, it seems to be wider than the main stem; is that so, have you more than one hundred feet?

A. Oh, I think they just slipped off——

Q. Oh, you mean the land?

A. Yes, we own the land; we own more than one hundred feet, yes, sir.

Q. How is your road constructed at that point?

A. It is on the surface.

Q. Up by the Pennsylvania, I mean?

A. Oh, that is on a high embankment, and that is the bank, the slope, and we have had to acquire more property there than one hundred feet.

40 Q. Does this map also show the tracks upon the main stem and the tracks that are not upon the main stem?

A. Yes, sir.

Q. I see in the middle of the map apparently a large number of tracks?

A. Yes, sir.

Q. Adjacent to the main stem?

A. Yes, sir.

Q. What are they used for?

A. For making up trains.

Q. Is that what is called your Oak Island yard?

A. Yes, sir.

Q. Is that in daily use?

A. Yes, sir; and very important use for the rail-

Q. The main stem is covered with tracks, too, is it not?

A. Yes, sir.

Q. What kind of trains do you make up at those points?

A. Why, those are principally freight trains; a distribution yard.

Q. There is no passenger business over this line either?

A. No, sir.

Q. Is there any difference in the kind of use made of the several tracks shown here, whether they be on the yellow strip or on the other?

A. Well, I should say no; it is all for the railroad use in the making up of trains, etc.

Q. Is not the distribution of cars also made there?

A. Yes, sir; the distribution of cars.

Q. This is practically the first terminal that the railroad company has?

A. Yes, sir; for the assorting of cars.

Q. When you reach the Jersey City terminal with your cars do you discharge them all there, or do you embark some of the cars upon floats.

41 A. A great many on floats.

Q. Where do they go?

A. They go to 42nd street and to 27th street.

Q. Do any of them go in bulk to the east through New York City?

A. Yes, sir; and to the south.

Q. Where are they taken?

A. They are taken to the piers and put on the floats and sent to the other road, wherever the connecting line may be.

Mr. CORBIN: I also offer this map in evidence. Exhibit P. No. 7.

Q. Do you know whether there are other points also between Phillipsburg and Jersey City where your railroad is more than one hundred feet wide?

A. Yes, sir; there are one or two other points.

Q. How is it in Phillipsburg?

A. We have land that extends over the one hundred feet there.
Q. And South Plainfield—have you not some there?
A. Yes, sir.
Q. Coal pockets?
A. Yes, sir.
Q. At the various stations in your land more than one hundred feet?
A. Yes, sir; at a number of them, and we have up at the tunnel considerably wider than one hundred feet.
Q. How many running tracks has your railroad when you get out into the country at different points?
A. Well, it is double track all the way through, and, of course, there are some very long sidings.

Cross-examination by Mr. HARDIN:

Q. You have stated that the land indicated on the map as main stem was assessed by the State Board of Assessors and the other land by the local assessors?
42 A. Yes, sir.
Q. The year 1906, was the first year that was the case, was it not; before that time all the land both first and second class was assessed by the State Board?
A. Yes, sir.
Q. Do you know whether there are any taxing districts through which the Lehigh Valley Railroad Company runs where there is no second class property?
A. I do not recall one; in some places we have very little, but I do not recall one where we have not any.
Q. It is a fact, is it not, that there are numbers of taxing districts where there is no second-class property except at the stations?
A. I do not recall any.
Q. You are the tax agent of the road, I understood you to say?
A. Yes, sir.
Q. And familiar with these tax matters?
A. Yes, sir.
Q. Are there not places in the country where for considerable distances the road runs along within the one hundred feet?
A. Yes, sir.
Q. Are you able to recall whether that is the case in any entire taxing district?
A. I do not believe that there is any entire taxing district that we have not some second-class property in.
Q. Are there not taxing districts where you have second-class property only at the station?
A. As to that, I would not be prepared to say.
Q. Have the local taxes for the year 1906 been paid by the road in any instance?
A. Yes, sir.
Q. Generally along the line?
43 A. Yes, sir; except at Jersey City.
Q. To the local authorities?
A. Yes, sir.

By the ATTORNEY-GENERAL:

Q. Have the taxes on the second-class property of the Morris Canal been paid in the several taxing districts for the year 1906?
A. Generally so; yes, sir.

By Mr. CORBIN:

Q. Who paid them?
A. The Lehigh Valley.
Q. The Lehigh Valley Road Company?
A. Yes, sir; the lessee of the Morris Canal.
Q. Did they pay them in Jersey City?
A. I think not; no, sir.

44 EXHIBITS OF MORRIS CANAL AND BANKING COMPANY.

Chater of The Morris Canal and Banking Company.

An Act to Incorporate a Company to Form an Artificial Navigation between the Passaic and Delaware Rivers.

Passed 31st December, 1824 (P. L. 158).

Whereas, the construction of a canal, to unite the river Delaware, near Easton, with the tidewaters of the Passaic, will be of great public benefit and advantages to the people of New Jersey; now, therefore, in order to secure to the state the results of this public work, and also as an inducement to a company to engage in this important undertaking, and in consideration of the risks and expenditures which they may encounter in its execution and operations; therefore,—

Be it enacted by the council and general assembly of this state, and it is hereby enacted by the authority of the same.

I. Incorporation, Name and General Powers.—That Jacob S. Thompson, of Sussex; Silas Cook, of Morris; John Dow, of Essex; Charles Board, of Bergen, and all and every other person or persons who may become subscribers, according to the mode hereinafter prescribed, their successors and assigns shall be and are hereby incorporated by the name of the "Morris Canal and Banking Company," for the purposes and with the privileges and immunities hereinafter described, defined and granted; and by that name
45 shall be a body corporate and politic in law, and shall and may sue and be sued, implead and be impleaded, in courts of justice or in any other place whatsoever; and the said company shall have power and authority, at any time after the passage of this act, to purchase, receive in donation, possess, enjoy and retain, demise, grant, alien and sell all such lands, tenements, hereditaments, water streams and water privileges, rights, goods, chattels and effects of every description whatsoever, as may be necessary for carrying into effect any of the provisions of this act, and under the restriction and limitations therein mentioned; and that the said company shall

have perpetual succession and power to make and use a common seal, and the same to renew and change at pleasure; and also to adopt, establish and carry into execution such by laws, ordinances and regulations as shall by its president and directors be judged necessary or convenient for the said corporation, in respect to its canal and banking operations hereinafter mentioned, and the same to change, alter, repeal, annul and re-enact: Provided, the same be not contrary to the constitution or laws of the United States or the State of New Jersey.

* * * * * * *

III. Directors, President, Meetings, Vacancies, Voting Power.—The management of the concern of the said company shall be and the same is hereby vested in fifteen directors, to be selected from the stockholders; and that the said directors shall choose, by plurality of votes, a president from among themselves; and as soon as conveniently may be, after the said stock of one million of dollars shall have been subscribed, the before named commissioners, or a majority of them, shall convene the said stockholders by public notice to be given as aforesaid, and at such time and place
46 as they shall designate in said notice, to choose the first board of directors, who shall hold their offices until the first Monday of April, eighteen hundred and twenty-six.

* * * * * * *

IV. Exemption from Taxation.—No state, county, township, or other public assessments, taxes or charges whatsoever shall at any time be laid or imposed upon the said canal company, or upon the stocks and estates which may become vested in them under this act; but this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation under this act, according to the true intent and meaning thereof; and no tax shall be imposed upon any property of said company, or of other persons transported or used upon or about said canal of greater amount, according to the value of the article taxed, than shall at the same time be imposed upon the property of the same or similar kinds in the State of New Jersey.

V. Power to build canal from the Delaware to the Passaic.—It shall be lawful for the said company to construct, make and execute a canal or artificial navigation to connect the waters of the Delaware River, near Easton, with the tide waters of the Passaic River, and passing through the County of Morris, with all the locks, works, devices, wharves, toll-houses and offices necessary for the use of said canal, and it shall and may be lawful for the said company, by its president and directors, and by any agent, engineer, superintendent or contractor, or any other person or persons employed in the service of said company, to enter from time to time, and at all times and upon all lands, whether covered with water or not, for the purposes of exploring or surveying the route or
47 routes for said canal, and locating the several works above specified, doing thereunto no unnecessary damage. And

when the said route or routes shall have been fixed upon and its several works located by the president or directors, or a majority of them, and a survey thereof deposited in the office of the secretary of state, then it may be lawful for them and for any agent, superintendent, engineer, contractor, or any person or persons employed in the service of said corporation, at any time to enter upon, take possession of and use all and singular such lands, water and streams, subject to such compensation to be made therefor as is hereafter directed.

VI. Condemnation proceedings.—Where lands, waters and streams, that may be useful for said canal, shall not be made a free gift by their owner or owners to the said company, then the company shall pay to the owner or owners such compensation as shall be mutually agreed upon. And in case of disagreement in relation to the value of such lands, waters and streams, or in case the owner or owners thereof be *feme covert;*

[Here follow proceedings for condemnation.]

and immediately thereupon, the estate, right, property and interest, in and to the premises so appropriated, described and appraised, shall be vested in the company, to be by them held so long as they shall be used for the purpose of said canal.

VII. Power to enter on adjacent lands and take materials.—It shall be lawful for the president and directors of said company, and their superintendents, engineers, workmen and laborers, with carts, wagons, and other carriages, and with their beasts of draught and burden, and all necessary materials, tools and implements, to enter upon all lands contiguous or near to the route or tract of the canal, doing as little damage thereto as possible, and repairing any breaches they may make in the enclosures thereof, and to take
48 and carry away any stone, gravel, clay, sand or earth, there being most conveniently situated, and being most suitable for making or repairing said canal, the locks and other devices before mentioned, thereto belonging—the said owners or occupants being entitled to a fair compensation or remuneration for the materials taken, or damages done, if claimed within twelve months from the time of such damage sustained, or materials taken away.

[Here follow proceedings for compensation.]

VIII. Powers of directors. Tolls. Increase of stock.—The president and directors of a majority of them, shall have power to elect all engineers, treasurers, collectors, cashiers, tollmen, clerks, agents, artificers, workmen, laborers, servants and officers whatsoever, necessary in their judgment, for conducting the affairs of the company, and to dismiss and elect others at their pleasure; and also shall have power to charge and collect tolls and rates for the passage of all boats, goods, draught cattle, wares, passengers, produce, and merchandise whatsoever, upon the canal, or upon its banks, and to make, enact, and at pleasure change and re-enact, such tolls and rates, and also regulations and rules, for the collection and levying of the same, as to them may seem proper; *provided* the company shall at no time charge more than three cents per ton per mile, on the passage of coal, lime, gypsum, iron, iron ore, and stone, and a

proportionable charge upon other articles, contemplating their bulk, weight and value.

* * * * * * *

XI. Route may be altered. Green Pond. Hopatcong.—Under the powers and conditions stipulated in the foregoing enactment, it shall be lawful for the company to alter at any time, any part or parts of the route of the canal making compensation for
49 damages to owners as hereinbefore directed; and that it shall not be lawful for any person or persons, or any body politic or corporate whatsoever, to construct any canal within ten miles of any point of the main trunk of the Morris Canal, without the consent of the said company, expressed in writing, under their common seal; but this prohibition shall not extend to the construction of any canal of less than ten miles in length, and which does not approach within two miles of the canal to be constructed under this charter, and saving to any person or persons, or body corporate, any of their just and legal rights already vested, to the contrary of such prohibition. And it shall be the duty of the chancellor of this state upon application made therefor by the solicitor of the company in due form, to issue his injunction to stay and prevent the construction of any such canal; and also, it shall be lawful for the said company to raise the waters in the Green Pond, and Lake Hopatcong commonly called the Great Pond, by damming the same, and to use the surplus waters thus saved, and so much water of said ponds as shall be necessary for said canal, to take and convey said waters unto said canal, all loss and damages to the owners of said ponds, and the lands flowed or otherwise used in obtaining water for the same as aforesaid, being paid for agreeably to the previous provisions of this act.

XII. Bridges for roads and farms.—When the said canal shall cross any public road or farm, it shall be the duty of said company at their proper expense to make good and sufficient bridges across said canal and to keep the same in repair, so as to prevent any inconvenience in the usage of the said road, or farms, by reason of the said canal crossing the same.

XIV. Banking powers and capital.—For the encouragement of so great an undertaking as the erection of said canal, and
50 in some measure to induce capitalists and others to subscribe to the same, it shall be lawful for the said company to increase the capital stock of said company for the purpose of banking operations, but under the following conditions, limitations, and restrictions, namely:

[Here follows regulations of the banking business.]

* * * * * * *

XXI. After eleven years to pay a bonus.—In eleven years after the passing of this act, and annually thereafter, the president and directors of said company shall be, and they are hereby required to pay or cause to be paid into the treasury of this state, the one-half of one per cent. on the whole amount of such capital actually subscribed and in, and which shall thereafter be paid in to such com-

pany for banking purposes as aforesaid; and upon neglect or refusal so to do by said president and directors, the said tax shall and may be recovered in such manner as is directed in an act entitled "An act to tax bank stock," passed November second, one thousand eight hundred and ten, or any other act or acts of the legislature for the time being, for the recovery of tax on bank stock; and the said tax, when collected, shall be appropriated as other bank tax is, or shall by law be directed to be appropriated.

XXII. Bank for thirty-one years.—So much of this act as relates to banking rights and privileges upon the increased capital of the company for banking purposes as aforesaid, shall continue and be in force for and during the term of thirty-one years from the passage of this act.

XXIII. Fifteen years to open canal.—Unless one million of dollars shall be subscribed as aforesaid, on or before the first
51 day of November next, and also, unless the said canal shall be completed and opened for the passage of boats within fifteen years from the passage of this act, then the same shall be, and is hereby declared to be null and void.

* * * * * * *

XXV. Canal to be a public highway. Tolls.—The said canal when completed shall forever thereafter be esteemed a public highway, free for the transportation of any goods, commodities, or produce whatsoever, on payment of the tolls, and conforming to the regulations made or authorized by this act. And it shall be lawful for the legislature of this state at any time hereafter to appoint three commissioners for the purpose of fixing and regulating the tolls to be taken on said canal, which shall be done by the said commissioners in conjunction with two commissioners to be appointed by the company, * * *

Provided, always, that they shall not have power to reduce said tolls lower than one half of the greatest amount allowed by the ninth section of this act, without the consent of the president and directors of said company.

XXVI. State may take the canal.—At the end of ninety-nine years from the passing of this act, it shall and may be lawful for this state to take to itself and on its own account, the said canal and its appurtenances, paying to the said company the fair value thereof, to be estimated and fixed upon by ten commissioners, or a majority of them, to be mutually chosen by this state and the said company; or in case that it shall not be done at that time, or within one year thereafter, this charter shall continue, so far as it respects its canal operations and privileges for the further term of fifty years, when it shall cease and the said canal with its appurtenances, becoming the sole property of this state.

52 XXVII. Can only take lands or waters necessary for navigation—The first, fifth, sixth and eleventh sections, and every other part of this act, shall be so construed as that the said corporation shall not be authorized to take or appropriate to the use of said canal, or under color or pretence that the same are necessary therefor, any

lands, waters or streams of water, but such only as are actually nec
sary for the erection and use of said canal, for the purposes of na
gation only and its necessary towing paths and works, as specifi
in the fifth section of this act; and that the said corporation shall n
be authorized to demise, grant, alien, or sell any such lands, wate
or streams taken, or pretended to be taken, or required, for the u
of said canal as aforesaid, or any part thereof, to any person
persons whomsoever (excepting only such lands as may be receiv
by them by donation, or acquired of them by private contract), a
that the said corporation, or any other person, shall not be auth
ized to use or appropriate any part of said waters for mills or a
other purpose than the mere navigation of said canal; and all wat
not used for that purpose, shall be permitted, without unnecessa
interruption, to flow into their ancient and natural courses a
channels; and that the twentieth section of this act shall be so co
strued as to extend to damages sustained not only by the erecti
of the said canal in the first instance, but also by the subseque
operations of the company, from time to time, as the same m
arise; anything in this act before contained to the contrary notwi
standing.

XXVIII. The Charter is a public act.—This shall be a pub
act, and shall be judicially referred to by all judges, justices a
others, without being specially pleaded.

53 *Supplement to Charter.*

Passed December 31st, 1824 (P. L. 157).

SEC. 1. Must call in and expend $100,000.—Any time after o
million of dollars shall be subscribed towards the capital stock
said company, and ten per cent. thereon paid to the commissione
and directors appointed as mentioned in said act, it shall be lawf
for the said company to call in from the stockholders respectively t
sum of one hundred thousand dollars, to be used for banking pu
poses, as directed in said act, but they shall not call in any mo
money for said purposes, except in conformity to the provisions
said act. And if the said company shall omit, for the space of o
year after the passing of this supplement, to expend the sum
one hundred thousand dollars on said canal, and file an accou
thereof, agreeably to the sixteenth section of said act, the banki
privileges hereby given shall cease.

An Act to Authorize the Morris Canal and Banking Company,
Extend the Morris Canal to the Waters of the Hudson.

Passed January 26, 1828 (P. L. 34).

SEC. 1. Extension of canal to Hudson River authorized.—It sh
and may be lawful for the Morris Canal and Banking Compan
incorporated by an act entitled "An act to incorporate a compa
to form an artificial navigation between the Passaic and Delawa

Rivers, passed December thirty-first, one thousand eight hundred and twenty-four, to continue the Morris Canal to the waters of the Hudson, at or near the City of Jersey; and for that purpose, said company shall have all the rights, powers and privileges given and granted by the said act, and shall be subject to all the restrictions, limitations, conditions, and provisions in the said act contained, in the same manner, and to the same effect, as if the said company had been originally authorized by said act, to construct a canal or artificial navigation to connect the waters of the Delaware River, near Easton, with the waters of the Hudson, at or near the City of Jersey: *Provided,* that the canal shall be connected with the Passaic River at the Village of Newark, so that the boats used on the said canal, can at all proper times pass from the same into the river, and from the said river into the canal: *Provided also,* that nothing herein or in the act of incorporation hereinbefore mentioned, contained, shall be taken or construed to hinder or prevent the legislature from authorizing a deep cut or canal, for sloop navigation between the Newark and New York bays: *And provided further,* that the said company, unless it be with the consent of the owner or owners, shall not take any lands for extending the said Morris Canal, pursuant to the provisions of this act, until the said lands shall have been surveyed and appraised, pursuant to the sixth section of the said act of incorporation, and until the said company shall have first paid, or tendered to the person entitled thereto, the amount of such appraisement; or in case such person shall be *femme covert,* under age, *non compos mentis,* or out of the state, the said company shall pay the same into the Court of Chancery of this state, and in all other respects the provision of the said act of incorporation shall be taken as applicable to the lands to be taken for the purpose of extending the said canal, pursuant to the provision of this act, in the same manner as they apply to lands which may be taken pursuant to the said original act of incorporation.

SEC. 2. Canal may be conducted through the streets of Newark and Jersey City.—It shall and may be lawful for the said company to make and construct the said canal through, upon, or along any street, road or public highway; but if the said canal shall be made or constructed through, upon or along any street or streets in the town of Newark and Jersey City, or either of them, in such case, the land occupied by said canal, and for its towing path, shall not exceed a space of thirty-two feet.

SEC. 3. Company to erect and keep in repair all necessary bridges, &c.—It shall be the duty of the said company, at their proper expense, to make good and sufficient bridges, and to keep the same in repair, across any part of the said canal which may be extended, pursuant to this act, so that it shall be convenient to the inhabitants at all times to pass to and from their lands and meadows, and to the waters and landing places of the said bays and rivers.

Amendatory Act of 1829.

An Act to Authorize the Morris Canal and Banking Company t
Borrow Money, and for Other Purposes.

Passed February 23, 1829 (P. L. 86).

SEC. 1. Company *to* authorize- to borrow money.—It shall an
may be lawful for the said Morris Canal and Banking Company t
borrow the sum of five hundred thousand dollars, and to issue there
for their post notes bearing an interest of six per cent. per annum
payable to the owners or *bona fide* holders thereof: *Provided,* tha
no such post note shall be issued of a less denomination than thre
hundred dollars.

SEC. 2. Authorized to mortgage the canal.—For the purpose o
securing the punctual payment of the interest and the redemptio
and payment of the princip*le* sums so to be borrowed as aforesai
the Morris Canal and Banking Company be, and they are hereb
authorized to execute and deliver to any person or persons, bod
corporate or politic, an assignment, conveyance, or transfer of th
said Morris Canal, with its appendages and appurtenances, an
of all the lands, tenements and premises belonging to th
56 said company and of the charter, chartered rights, and privi
leges of the same, and conditioned for the purpose aforesaid
which assignment, conveyance, or transfer, shall be entered on rec
ord in the office of the secretary of this state, and shall be valid an
effectual as a collateral security for the payment of the principa
and interest of the said post notes, according to tenor and effec
thereof.

SEC. 3. Penalty for non-payment of post notes.—If the said com
pany shall neglect or refuse to pay to any person or persons, bein
the owners or *bona fide* holders or assignees of any post note o
post notes so to be issued by the said company for said loan of fiv
hundred thousand dollars, the interest due thereon as the same ma
become due, or the principal amount of such post note or post notes
when the principal thereof shall become due, at the banking hous
and other office of the said company in this state, the same havin
been presented for payment, then, and in either of the cases afore
said, upon such failure and defalcation being proved, or otherwis
made to appear to the satisfaction of the chancellor of this state
the said Morris Canal, with all its appendages and appurtenances
and all its chartered rights and privileges, shall become the propert
of the said assignees or transferees, for the use and benefit of th
bona fide owners of the post notes that may have been issued by th
said company under the provisions of this act; and thereafter the sai
assignees or transferees shall hold, use, and enjoy the said canal
with its appendages and appurtenances, and take and receive th
tolls, rents, issues and profits thereof, in trust for the owners, a
aforesaid, of the said post notes in proportion to their respective in
terest therein, during the whole of the residue of the term for which

the said company was chartered, in as full and ample a manner as the stockholders of the said company could or might have
57 used and enjoyed the same, subject, nevertheless, to all the restrictions, limitations, and conditions contained in the said charter.

SEC. 4. Interest to be punctually paid.—If the said Morris Canal and Banking Company shall pay to the owners or *bona fide* holders of the post notes so to be issued by them for the said loan, the interest to become due therein in manner aforesaid, and the principal sums due thereon, when the same shall become payable, according to the tenor and effect of such post notes, then and from thenceforth the said Morris Canal and Banking Company shall stand seized and possessed of said canal, with all its appendages, and appurtenances, and of and with all the rights, immunities and privileges contained in and guaranteed to them by their original charter, in as full and ample a manner as if this act had not been passed, and the grant, conveyance, or assignment of the said canal, with the lands, appendages, and appurtenances hereinbefore provided for, shall cease and be utterly null and void, and as if the same had never been made.

Amendment to the Charter.

Passed January 28, 1830 (P. L. 17).

Whereas, the Morris Canal and Banking Company have petitioned for certain amendments, modifications, and alterations of the acts, incorporating and affecting the said company—

SEC. 2. Power to mortgage the canal.—The Morris Canal and Banking Company may, from time to time, borrow all such sum and sums of money as to the board of directors of the said company shall appear necessary and proper, and for securing the due payment of the sums so borrowed, with the interest thereof, it shall and may be lawful for the said company to pledge or hypothecate, by
58 way of mortgage, trust or otherwise, howsoever, the Morris canal with all its privileges, appendages and appurtenances, and all the property and chartered rights of the said company; and such pledge, hypothecation, mortgage or trust, may be valid for the due payment of any sum or sums of money, with the interest thereof, which the same may be given to secure; and in case default shall be made in the payment of any sum or sums of money so borrowed as aforesaid, or the interest thereof, the person or persons body politic or corporate, or their legal representative or assigns, claiming under such pledge, hypothecation, mortgage or trust, may, by due process of law, acquire and have, and hold, use and enjoy, the said canal with its appendages and appurtenances, and the property of the said company, and to take and receive the tolls rents, issues and profits thereof, during the whole residue of the term, for which the said company is chartered or incorporated, in as full and ample a manner as the stockholders of the said company could or might have had used and enjoyed the same, subject nevertheless to all the

restrictions, limitations, and conditions contained, in the said first mentioned act or charter of the said company; *provided*, that any deed by which any pledge, hypothecation, mortgage, or trust, shall be created by virtue of this act, shall be entered of record in the office of the secretary of state, of this state; *provided also*, that nothing herein contained shall be taken or construed to effect or impair any prior liens that there may be on the said canal, or on the rights or property of the said company; and that all person or persons, bodies politic or corporate, claiming by virtue of any pledge, hypothecation, mortgage, or trust, made pursuant to this act, shall have no right or title otherwise than according to the priority
59 of their respective incumbrances, or of the pledge, hypothecation, mortgage, or trust, which may have been given or created for his or their benefit.

A Further Supplement to the Charter.

Passed January 19th, 1835, (P. L. 17).

Capital stock increased.—The capital stock of the Morris Canal and Banking Company be increased, for the purpose of completing the said canal, and paying the debts and claims already incurred by reason of the construction thereof, ten thousand shares;

* * * * * * *

Provided, that no part of the moneys arising from the subscription hereby authorized, be applied to the exercise of any banking or trust powers whatsoever, but solely and exclusively to the completion of said canal, and the payment of its debts, as above stated.

A Further Amendment to the Charter.

Passed March 5th, 1836 (P. L. 262).

SEC. 1. Tolls on feeders.—Upon such navigable feeder or feeders, as in virtue of this act, or the act of original incorporation, may be constructed by the Morris Canal and Banking Company, for the purpose of conducting into the Morris Canal the waters of Long Pond, or other waters that may be requisite for the supply of the said canal, the said company shall be and are hereby authorized to charge and receive the same rates of toll as are now lawfully chargeable upon the said canal.

60 SEC. 2. May let the waters to use.—The twenty-seventh section of the act to which this is a supplement, shall not be so construed as to prohibit or prevent the said Morris Canal and Banking Company from letting to use the water necessary for the purposes of the canal, in working other machinery than that requisite for the planes, between Boonton, in the County of Morris, and the passaic at Newark; but no other person or persons shall so appropriate the water of said canal, without the consent of said company; *provided*, that nothing in this act contained shall be construed to

authorize the said company to interfere with the rights or privileges of other persons, in the use of the waters of this state, for the said purposes, without their consent; and *provided* also, that the said company shall not carry on or engage in any manufacturing business, and *provided* further, that nothing in this act contained shall be construed to authorize the said company to use as much of the waters of the Musconetcong Creek, for the said purposes as to deprive the owners of mills or manufactories on said creek, below the dam at Saxon's Falls, of sufficient water to turn one wheel as at present used to drive two run of millstones, with the necessary fixtures for the same, during eight weeks in the year, and at least two wheels, each of the same power, during the residue of the year, without the consent of the owners.

SEC. 3. Capital stock may be increased for procuring land, &c.—In order to enable the said company to procure the requisite lands and premises, and to construct the several basins, reservoirs and feeders, authorized by the said act of incorporation, and the amendments thereto, the said Morris Canal and Banking Company shall be and they are hereby authorized to increase the capital stock thereof, to an amount not exceeding six hundred thousand dollars.

* * * * * * *

61 *A Further Supplement to the Charter.*

Approved February 9, 1849 (P L. 33).

Whereas, the Morris Canal and Banking Company, as now constituted, under the sale made in accordance with the decree of the Court of Chancery, dated 10th day of July, eighteen hundred and forty-four, of the canal, works, waters, privileges, appendages, appurtenances, and chartered rights of the company incorporated under the act to which this is a further supplement, have a nominal capital stock consisting of forty-one thousand shares of the par value of one hundred dollars each, making the apparent capital of the said company so constituted, four millions one hundred thousand dollars, which amount of capital far exceeds the value of the property owned by the said company; and whereas, the said company are desirous of reducing the number of shares of their stock, and of issuing a preferred stock, and of connecting the navigation of their canal with that of the State of Pennsylvania; and for the more convenient exercise of the chartered rights with which, under the said sale they are invested, are desirous of reducing the number of directors necessary to the transaction of business; therefore,

SEC. 1. Number of shares of capital stock reduced.—The said company are hereby authorized and empowered to reduce the number of shares of their capital stock to ten thousand two hundred and fifty shares, which shares shall have the same nominal value as heretofore.

SEC. 2. To issue preferred stock.—It shall be lawful for the said company to issue eleven thousand and seven hundred and fifty shares of new stock, to be issued as preferred stock, and to bear such

rates of dividends as the board of directors may pre-
62 scribe, to enable said company to perfect their canal.

[Here follow provisions for subscriptions to preferred stock.]

SEC. 6. Acceptance of the stockholders; surrender of the banking powers.—The foregoing provisions of this act shall take effect when, and not until the same shall have been accepted by the stockholders of the said company; and for the purpose of obtaining such acceptance, the board of directors of the said company shall call a meeting of the stockholders of the said company, and shall cause notice of the time, place and object of said meeting to be given for twenty days, by advertising the same in the manner specified in section three of this act; that the transfer books of the said company shall be closed five days previous to the time of meeting so advertised; at which meeting the said stockholders shall be entitled to vote, either in person or by proxy, according to the number of shares standing in their names, respectively, on the stock books, each share of stock being entitled to one vote; and if the holders of two-thirds of the stock represented in such voting, accept of the foregoing enactments of this bill, then the same shall take effect, otherwise the same shall be inoperative; *provided, nevertheless,* that if at any time within one year from the passage hereof, such vote shall be obtained in manner herein prescribed, the said foregoing provisions shall take effect, and that the certificates of a majority of the board of directors, signed and sworn to by them, and filed in the office of secretary of state, setting forth such acceptance of the stockholders, at a meeting which they certify was held according to the requirements of this act, or a certified copy of such certificate, shall at all times be good evidence of the acceptance herein mentioned of the said stockholders; *and provided also,* that the foregoing
63 sections shall not take effect until the board of directors of the Morris Canal and Banking Company, shall, by writing duly executed under the common seal of said company, and filed in the office of the secretary of state of this state; surrender all the banking powers and privileges granted by the original charter and the several supplements thereto.

[Here follow provisions relative to quorum, bridges, &c.]

Certificate of Acceptance by Stockholders of "The Morris Canal and Banking Company" of the Supplement to the Charter of the said Company Passed February the Ninth, Eighteen Hundred and Forty-nine.

We, Ephraim Marsh, Caleb H. Valentine, John I. Bryant, I. B. Varnum, Henry Southmayd, W. H. Talcott, J. I. Coddington, William Dickey, Tebedee Cook, A. Van Santvoord, Jas. T. Soutter, and Asa Whitney, being directors of "The Morris Canal and Banking Company," do hereby certify that we the undersigned now compose, and for a year last past have composed a majority of the board of directors of the said company. And the undersigned hereby further certify that a meeting of the stockholders of the said company was

held at the office of the company in Jersey City on the fifteenth day of May in the year of our Lord one thousand eight hundred and forty-nine, according to the requirements of the act entitled "A further supplement to the act entitled an act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers," passed February the ninth, eighteen hundred and forty-nine. That the said meeting was called by the board of directors of the said company for the purpose of obtaining the acceptance of the enactments and provisions of the said act contained in the
64 preamble and sections of said act proceeding the sixth section of said act by the stockholders of said company. That the said board of directors caused notice to be given and notice was given of the time, place and object of said meeting for more than twenty days previous to the said meeting in three newspapers published in the State of New Jersey, one at the City of Trenton, one at the City of Newark and one at Morristown, and in three newspapers published in the city of New York and in three newspapers published in the city of Philadelphia. And the undersigned hereby further certify that the transfer books of the said company were closed for five days previous to the time of meeting, so advertised. And the undersigned further certify that at the meeting so called and advertised as aforesaid by the board of directors and so held as aforesaid by the stockholders of the said company on the fifteenth day of May in the year eighteen hundred and forty-nine, at Jersey City, for the purpose aforesaid, the stockholders were entitled and permitted to vote on the acceptance of the said enactments and provisions of the said act, either in person or by proxy, according to the number of shares of the capital stock of said company standing in their names respectively on the stock books of said company, each share of stock having one vote. And that the stockholders of the said company did then and there proceed accordingly to vote on the acceptance of the said enactments and provisions of the said act. And the undersigned do hereby further certify that the holders of more than two-thirds of the stock represented in the said meeting on the voting on the acceptance aforesaid of the said enactments and provisions of the said act herein before referred to by its title, did then and there vote in favor of the acceptance of the said enactments and provisions of the said act and did then and there accept the same.

65 In witness whereof, we have hereunto set our hands the twenty-sixth day of June in this year of our Lord one thousand eight hundred and forty-nine.

EPHRAIM MARSH.
CALEB H. VALENTINE.
JOHN I. BRYANT.
I. B. VARNUM.
HENRY SOUTHMAYD.
W. H. TALCOTT.
J. I. CODDINGTON.
WILLIAM DICKEY.
TEBEDEE COOK.
A. VAN SANTVOORD.
JAS. T. SOUTTER.
A. WHITNEY.

NEW JERSEY,
Hudson County, ss:

Be it remembered, that on the twenty-sixth day of June (1849), in the year of our Lord eighteen hundred and forty-nine, personally appeared before me, I. W. Scudder, a Master in Chancery in and for the State of New Jersey, Ephraim Marsh, Caleb H. Valentine, I. B. Varnum, Henry Southmayd, John I. Bryant, W. H. Talcott, William Dickey, Tebedee Cook, A. Van Santvoord, J. I. Coddington, Jas. T. Soutter, A. Whitney, all of full age, who, being by me first respectively duly sworn on their respective oaths aforesaid, did depose and say that the facts, matters and things set forth in the foregoing certificate are true.

EPHRAIM MARSH.
CALEB H. VALENTINE.
I. B. VARNUM.
HENRY SOUTHMAYD.
JOHN I. BRYANT.
W. H. TALCOTT.
WILLIAM DICKEY.
66 TEBEDEE COOK.
A. VAN SANTVOORD.
J. I. CODDINGTON.
JAS. T. SOUTTER.
A. WHITNEY.

Sworn and subscribed before me at Jersey City the day and year aforesaid.

I. W. SCUDDER,
Master in Chancery of said State,
Residing in the County Aforesaid.

Endorsed: "Filed June 29, 1849. Charles G. McChesney."

STATE OF NEW JERSEY,
Department of State.

I, S. D. Dickenson, secretary of state of the State of New Jersey, do hereby certify that the foregoing is a true copy of certificate of acceptance by stockholders of "The Morris Canal and Banking Company" of the supplement to the charter of the said company, passed February the ninth, eighteen hundred and forty-nine, as the same is taken from and compared with the original, filed June 29, 1849, and now remaining on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Trenton, this twenty-fifth day of February, A. D. 1907.

S. D. DICKINSON,
Secretary of State.

67 *Lease of Basin* 1867.

A Further Supplement to the Charter.

Approved March 14th, 1867 (P. L. 25).

1. Grant of tide-water basin in Jersey City.—The State of New Jersey hereby grants to the Morris Canal and Banking Company all the right, title, and interest of the state in and to the land and lands under the water within the following boundaries: Beginning at a point in Hudson River in the southerly line of South street extended seven hundred and sixty-five feet from the easterly line of Hudson street, and running thence (1) westerly along the said southerly line of South street to the centre line of Washington street extended, thence (2) southerly along said centre line two hundred and sixty feet, thence (3) westerly on a line parallel with South street as laid down on Mangin's map to the easterly line of Warren street extended, thence (4) southerly and along the said easterly line of Warren street extended, to a point distant four hundred and sixty feet at right angles from the southerly line of South street, thence (5) parallel with South street, easterly to a point in the centre line of Washington street extended and distant four hundred and sixty feet from the southerly line of South street, thence (6) southerly, along said centre line of Washington street extended, five hundred feet to the northerly line of the property occupied by the Central Railroad Company of New Jersey, thence (7) easterly along said line seventeen hundred and thirty-five feet, and thence (8) northerly to the place of beginning; on condition that for the purpose of preserving a water basin to the west of the present westerly bulkhead on said premises and of leaving open on the premises hereby granted, a public navigation for all vessels to and from the Hudson River, and all parts of the waters west of said westerly
68 bulkhead; the said company shall forever keep open the present gaps in the easterly and westerly bulkheads, each of one hundred and fifty feet in width, and like gaps of like width in any structure to be erected on said premises hereby granted, so that the public may with all the vessels freely navigate to and from the channel of the Hudson river and all places east and west of said westerly bulkheads without the payment of tolls or charges; provided, that the said opening shall be kept in such condition that the owners and occupants of shore property lying north and west of the above described property, may at all times have free access to as well as through the same; And provided, further, that the said company shall, within ninety days after the passage of this act, execute and deliver to the governor of this state their promise and undertaking, under seal, unconditionally to pay into treasury of this state, yearly, the sum of twenty-five thousand dollars per year, on or before the first Tuesday of January in each year, during the continuance of their charter, and so long as the said company, their successors or assigns, shall continue to hold or occupy the same, the first payment of a ratable portion of which shall fall due on the first Tues-

day of January, eighteen hundred and sixty-eight; it shall be lawfu for the said company instead of the said annual payment of twenty five thousand dollars, to pay into the treasury of this state at an time the sum of three hundred and fifty-seven thousand one hundre and forty-two dollars.

2. May construct piers, etc.—The Morris Canal and Bankin Company may, under the provisions of their charter, construct pier wharves, docks, basins, warehouses and other structures within th limits above described, and make reasonable rules and regulation for the use thereof, to enable them to carry on a transportation bus ness in and over their canal and elsewhere, which they are hereb empowered to do, and also to afford facilities for commerce
69 provided, that the exemption of said company in its origina charter from taxation, assessments or other legal imposition shall not extend to the property or privileges hereby granted.

3. This act shall take effect immediately, and be in force durin the continuance of the charter of the said Morris Canal and Bankin Company, and, at the expiration of that time, the lands hereb granted, with the improvements thereon, shall revert to the stat on the same terms and conditions provided in the original charte of said company, respecting the transfer of the property thereof t the state.

Act of 1871 *Authorizing Lease.*

A Further Supplement to the Charter.

Approved March 14th, 1871 (P. L. 444).

1. May lease the canal.—It shall and may be lawful for th Morris Canal and Banking Company, by and with the consent of majority in interest of the stockholders of the said company, ex pressed in writing and duly authenticated by affidavit, and filed i the office of the secretary of state, to lease the canal of said company or any part thereof, with all or any of its boats, property, works appurtenances and franchises, to any person or persons, or corpora tion, either perpetually or for such shorter time, and upon such rents and agreements, as may be agreed upon between the sai contracting parties, and it shall be lawful for the lessee or lessees i said lease to use and enjoy the said property and franchises so de mised, for the term in said lease mentioned.

2. Dissenting stockholder's remedy.—If any stockholder, stock holders, being such at the time of making such lease, shall be dis satisfied with the same, the said contracting parties, or one of them shall pay to such dissatisfied stockholder or stockholders th
70 full value of his, her or their stock immediately, prior t such lease, to be assessed by three disinterested commission ers, appointed for that purpose by the chancellor or chief justice o the Supreme Court of this state, on the application of either party made upon twenty days notice, but said contracting parties shall no be compelled to pay for the stock of any such dissatisfied stockholde

or stockholders, unless he or they shall give written notice of such dissatisfaction to the president or secretary of the said Morris Canal and Banking Company, before or within three months after such lease shall have been made and consented to by the requisite number of stockholders; and said lease shall not be valid as against such dissenting stockholder or stockholders until his or her stock shall have been paid for as provided in this act; provided, that no such lease shall have the effect, or be construed to release or discharge the said Morris Canal and Banking Company from the payment of any taxes, annuities, revenues or debts, which the said company may be subject or liable to, either to the state or to any other person or persons; provided, further, that if the said company shall pay to any dissatisfied stockholder or stockholders the value of his, her or their stock so assessed, such stock shall not be thereby cancelled or retired, except at the option of said company, but the said stock may be sold or re-issued by such company at such price as the directors may deem expedient, and if said stock shall be paid for by any other contracting party to said lease, such stock shall become the property of the party paying therefor.

3. Surplus water may be used for supply of city, &c.—It shall be lawful for the said company, or its lessee or lessees, to use the surplus water of the canal of said company, or any of its feeders, not needed for the purpose of navigation, in furnishing and supplying the inhabitants of any city, town or village along the line of said
71 canal or in the vicinity thereof, with a sufficient quality of pure and wholesome water for manufacturing or domestic and other uses; and to make contracts with the corporate authorities of any such city, town or village, or with individuals, for such supply of water, for such compensation as may be mutually agreed upon, and to erect such works, and make such alterations in the said canal as may be necessary or proper to enable said company, or its lessee or lessees, to furnish such supply of water from the said canal; provided, that nothing herein contained shall be held to authorize the diversion of the said canal from the purposes of navigation; provided, further, that nothing in this act contained shall be construed to authorize the said company to use as much of the water of the Musconetcong Creek as to deprive the owners of mills or manufacturers on said creek, below the dam at Saxon's Falls, of sufficient water to run one wheel, as at present used to drive two run of millstones, with the necessary fixtures for the same, during eight weeks of the year, and at least two weeks, each of the same power, during the residue of the year, without the consent of the owners; and provided further, that nothing herein contained shall be held to authorize the said company, or its lessee or lessees to do any act affecting the existing rights of the Society for Establishing Useful Manufactories.

4. Consent *to* stockholders to be filed.—This act shall take effect immediately, and be deemed a public act; and the said consent of stockholders herein and hereby required to be authenticated and filed in the secretary's office, when so authenticated and filed, together with the fact of the amount of stock held by each, the same

being also authenticated by affidavit shall be sufficient proof in all courts and places where the same may come in question, unless the contrary be made to appear, by the original affidavit so filed, or by a duly certified copy thereof made by the secretary of state.

72 5. Repealer.—All acts and parts of acts inconsistent with the provisions of this act, be and the same are hereby repealed.

Supplement of 1873 *to Charter.*

A Further Supplement to the Charter.

Approved April 2d, 1873 (P. L. 1347).

1. Branch canal in Passaic County.—The Morris Canal and Banking Company, or their lessees, the Lehigh Valley Railroad Company, are hereby authorized and empowered to construct, operate, and maintain a branch canal with all necessary locks and planes, from a point in the main canal at or near Centreville, in Passaic County, to the Passaic River at Dundee Lake, above the dam of the Dundee Water Power and Land Company.

2. Right of way for same.—The Morris Canal and Banking Company, or their lessees, the Lehigh Valley Railroad Company, are hereby authorized and empowered to obtain the right of way for the construction of said canal, locks and planes respectively, in the same manner as provided for the Dundee Water Power and Land Company, to obtain the right of way for their branch road, as provided in an act entitled "A further supplement to the act entitled 'An act to incorporate the Dundee Manufacturing Company,'" approved March twentieth, one thousand eight hundred and seventy-two.

73 *Bridge Act of* 1879.

An Act in Relation to Bridges Across the Morris Canal.

Approved March 14th, 1879 (P. L. 321).

Whereas, by the twelfth section of the act entitled "An act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers," passed December thirty-first, one thousand eight hundred and twenty-four, it was provided "that when the said canal shall cross any public road or farm, it shall be the duty of the company, at their proper expense, to make good and sufficient bridges across said canal, and to keep the same in repair, so as to prevent any inconvenience in the usuage of the said road or farm, by reason of the said canal crossing the same;" and whereas, the said company have, from time to time, raised their bridges across said canal, and in one thousand eight hundred and seventy-three adopted an ordinance providing that all bridges thereafter

constructed across their canal should be so built that the lowest part of any bridge should be ten feet from the water; and whereas, in pursuance of said ordinance many of their bridges have been since raised, and the company have required the boards of chosen freeholders of the several counties intersected by said canal also to conform to said ordinance.

1. Bridges to be ten feet high.—All bridges over the Morris Canal and its feeders, hereafter to be built or rebuilt, shall be so constructed as to leave a clear space of ten feet from the usual high water mark of said canal to the lowest part of said bridge.

* * * * * * *

2. Grade of approaches.—If said company shall hereafter raise any of their bridges in the line of any public highway above the present height thereof, it shall be their duty to so fill in the
74 approaches thereto that the grade shall not be more than one foot in ten, and to make the said approaches at least one rod wide.

3. This act shall take effect immediately.

Exhibit P 1.

Lease to Lehigh Valley Railroad Company.

This indenture, made this fourth day of May, Anno Domini, eighteen hundred and seventy-one, by and between the Morris Canal and Banking Company, a corporation created by, and existing under the laws of the State of New Jersey, of the first part, and the Lehigh Valley Railroad Company, a corporation created by, and existing under the laws of the State of Pennsylvania, of the second part.

Witnesseth, That for and in consideration of the covenants and agreements hereinafter contained, by the party of the second part to be kept and performed, and of the sum of one dollar in hand paid by the party of the second part, the receipt whereof is hereby acknowledged (1), the party of the first part doth hereby let and demise unto the party of the second part, its successors and assigns, the entire canal and navigation works of the party of the first part, as the same are now located and constructed, from the River Delaware, at Phillipsburg, in the County of Warren, in the State of New Jersey, to the River Hudson, at Jersey City, in the County of Hudson, in the same state, or as the same may hereafter be constructed, in pursuance of any and every lawful authority now existing, or which may hereafter exist, with all the branches and extensions thereof, made and to be made; also all the lands and water rights, privileges and easements, dams, basins, pools, reservoirs, feeders, locks, gates, machinery, fixtures, railroads, tracks, wharves, docks, piers,
75 landings, water-rents, ground-rents, lands, tenements and hereditaments, with the appurtenances, reversions, remainders, rents, issues and profits thereof, now belonging, or in any wise appertaining, to the party of the first part, or which, for any purpose incident to, or connected with, the business which the party

of the second part, its successors or assigns, may as lessee of the party of the first part, lawfully carry on, may hereafter be acquired by the party of the first part; and, also, all the corporate franchises, rights and privileges, other than that of being a corporation, now held, or hereafter to be acquired, of the party of the first part: To have and to hold the premises thus leased and demised as aforesaid, or intended so to be, unto the party of the second part, its successors and assigns, perpetually hereafter. And (2) the party of the first part doth hereby grant, bargain and sell, assign, transfer and set over unto the party of the second part, all cars, trucks, boats, tugs, scows, dredging machines, tools, implements, apparatus, furniture, mules, horses, cattle, harness, supplies, stores, and movable property of every kind and description; and, also, all the right, title, interest, claim, property and demand whatsoever of the party of the first part in and to all leases, bills of sale, or contracts relating to boats or vessels heretofore leased, hired or sold by it; all bonds, stocks, claims, demands, beneficial interest in contracts, choses in action, maps, plans, surveys, and generally, all personal property whatever, of every kind and description, whether hereinbefore specially referred to or not, to which the party of the first part is now, in any manner or way, entitled, excepting only the furniture of the principal office of the party of the first part at Jersey City, its corporate seal, and its business books, papers and records: To have and to hold the same unto the said party of the second part, its successors and assigns, to and for its and their proper use and behoof forever. And in consideration of the premises, the
76 parties hereto have mutually covenanted and agreed, and do hereby for themselves, their successors and assigns, covenant and agree, to and with each other as follows:

First. That the party of the second part shall advance to the party of the first part a sum sufficient to pay off and discharge the debts and liabilities of the party of the first part, enumerated in the schedule marked A, hereto annexed, and identified by the signatures thereto of the presidents of the respective parties, or shall itself pay off, satisfy and discharge the said debts.

[Here follow provisions for the payment of the principal and interest of bonds, "boat loan," scrip, &c.]

Fifth. That the party of the second part shall pay the sum of seventy-nine thousand two hundred and fifty dollars ($79,250), like lawful money of the United States of America, on the first Tuesday of the months of August and February hereafter, as follows, viz: the first payment of seventy-nine thousand two hundred and fifty dollars ($79,250), viz., that falling due on the first Tuesday of August, A. D. 1871, to be made directly to the party of the first part; and each successive payment of seventy-nine thousand two hundred and fifty dollars ($79,250), thereafter, to be distributed by the party of the second part in paying a semi-annual dividend of five per cent. on the eleven thousand seven hundred and fifty (11,750) shares of preferred stock, and a semi-annual dividend of two per cent. on the ten thousand two hundred and fifty (10,250) shares of common or so called consolidated stock now constituting the

entire capital stock of the party of the first part, the said dividends to be payable to the holders of the said shares of stock as they stand registered on the books of the party of the first part, on the
77 fifteenth day of the month preceding the said first Tuesday of February and August, respectively.

* * * * * * *

Seventh. That the party of the second part shall punctually and faithfully pay all taxes, charges and assessments of any and every kind which shall hereafter be lawfully assessed or imposed upon the premises hereby demised, or any part thereof, or on the business, or any of the business done thereon or therewith, or on the receipts, gross or net, of the said business, or on the present capital stock of the party of the first part, or on any corporate right, franchise or privilege of the party of the first part hereinbefore granted and demised to the party of the second part; but nothing herein contained shall be construed as rendering the party of the second part liable for any tax, charge or assessment which may be assessed, or become in any way chargeable, on the sums hereinbefore agreed to be paid by the party of the second part to the party of the first part, its creditors or stockholders, or for any tax, charge or assessment chargeable against, or collectible from, the said party of the first part, its creditors or stockholders, for or on account of the payment to, or receipt by, them of the said sums, or any part thereof.

Eighth. That the obligation of the party of the first part to pay the State of New Jersey the sum of twenty-five thousand dollars ($25,000) yearly, and all other conditions and obligations imposed upon, or assumed by, the party of the first part, under or by virtue of the first section of the act of the Legislature of the State of New Jersey, approved the 14th of March, A. D. 1867, entitled "A further supplement to the act entitled 'An act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers,'" passed December thirty-first, eighteen hundred and twenty-four, and "the promise and undertaking" of the party of the
78 first part, made under and in pursuance of the said section, shall be kept, performed and discharged by the party of the second part.

Ninth. That the party of the second part shall from time to time, and at all times, save harmless and indemnify the party of the first part from and against all loss and damage resulting from, or occasioned by, any failure or neglect of the party of the second part to comply with the covenants, stipulations and conditions herein contained, on the party of the second part to be kept and performed, or from any failure of the party of the second part to do or omit whatever it may lawfully be required to do or omit in the use, management and control of the demised premises.

Tenth. That the party of the second part shall and may avail itself of every franchise, right and privilege in regard to the use, maintenance, extension, improvement or alteration of the canal, navigation works and other property herein demised, conferred and granted by any present or future law; the party of the first part

hereby agreeing, that nothing in this indenture contained shall restrict or impair the right of the party of the second part to do or omit anything in the premises which it might otherwise lawfully do or omit.

Eleventh. That the party of the first part shall and will maintain its corporate existence and organization, and shall and will from time to time, and at all times, when requested by the party of the second part, its successors or assigns, put in force and exercise each and every corporate power, and do each and every corporate act which the party of the first part might now, or may at any time hereafter, lawfully put in force and exercise, to enable the party of the second part, its successors or assigns to enjoy and exercise every right, franchise and privilege which may lawfully be enjoyed or exercised in respect to the use, maintenance, management, renewal, extension, alteration or improvement of the premises hereby demised,
79 or intended so to be, of the business thereon or therewith to be carried on; the party of the second part hereby agreeing to pay to the said party of the first part the yearly sum of fifteen hundred dollars ($1,500), in lawful money of the United States of America, in equal semi-annual payments, for the purpose of defraying the expense of maintaining the corporate organization of the party of the first part; the first payment to be made on the first day of September next, and semi-annually thereafter; and the party of the second part further agreeing to indemnify and save harmless the party of the first part against all expense, loss, damage or liability resulting from, or occasioned by, any exercise of corporate powers, or performance of corporate acts, by the party of the first part, when exercised or performed at the request of the party of the second part.

* * * * * * *

Fourteenth. That the said party of the second part, its successors and assigns, keeping and performing the covenants herein contained, on its and their part to be kept and performed, shall and may from time to time, and at all times, peaceably and quietly have, hold, use and enjoy the demised premises, and every part and parcel thereof, with the appurtenances, without any manner of let, suit, trouble or hindrance from the party of the first part, its successors or assigns; and that the said party of the first part shall and will at any time hereafter execute and deliver, at the expense of the party of the second part, such other and further deeds, assurances and instruments of writing as may be reasonably required for fully effectuating and carrying out the objects and purposes of this agreement, and the more fully granting, securing and assuring unto the party of the second part the estate, franchises, rights and privileges hereinbefore granted, leased or demised, or intended so to be.

80 Fifteenth. That it shall be lawful for the said party of the second part to use the name of the party of the first part in all suits or actions and in all proceedings, whether at law, in equity or otherwise, instituted or taken by the party of the second party to assert, maintain or defend the estate, franchises, rights, liberties and privileges hereby demised, or intended so to be, when-

ever the party of the second part shall be advised by counsel that the use of the said name will be either necessary or convenient for the purposes in view. And the party of the first part does hereby constitute and appoint the president, for the time being, of the party of the second part, its true and lawful attorney, for it, the party of the first part, and in its name, but for the use and benefit of the party of the second part, to do and perform whatever act, and to sign, seal, acknowledge and deliver whatever deed, instrument or assurance may be required, to fully perform and carry out each and all of the covenants and agreements hereinbefore contained, on the part of the party of the first part to be performed and carried out, according to their true intent and meaning.

Sixteenth. That the party of the first part hereby covenants that the premises hereby demised are absolutely free and clear from any and every charge, lien or incumbrance whatever, excepting the mortgages and deed of trust securing the boat loan hereinbefore mentioned.

Seventeenth. That in case the said party of the second part shall at any time refuse or neglect, for the period of six months, to make any of the payments by them in this indenture agreed to be made then, and in that case the said party of the first part, may, at its option, at any time within ninety days thereafter, but not afterwards, for that default, treat this lease as at an end, and at once resume, and take, and hold full possession and control of all
81 the property by these presents leased and demised, free and clear of all right and control of the party of the second part, the same as if this lease had not been made: Provided, that the repossession of said property by the said party of the first part, under the option hereinbefore named, shall in no manner vitiate or discharge any legal claim, or demand the party of the first part may have against the party of the second part by reason of any breach of these presents occurring at or before the time when the said party of the first part shall repossess themselves of said property: And provided, also, that the party of the first part shall during the period of at least thirty days before taking the possession of said property, publish in two newspapers, printed in each of the cities of New York and Philadelphia, a notice to the stockholders of the party of the second part of such default, and intention to resume possession of said property; and the party of the second part may, at any time before the expiration of the thirty days' notice above mentioned, stay all further proceedings by the payment of the amount then due.

* * * * * * *

In Witness Whereof, the parties hereto have caused to be hereunto affixed their corporate seals, duly attested by the signatures of their respective president and secretary, this the day and year first above written.

JACOB F. RANDOLPH, *President.* [SEAL.]
THE MORRIS CANAL & BANKING CO.
JNO. R. BURNETT, *Secretary.* [SEAL.]
ASA PACKER,
Pres't of the Lehigh Valley Railroad Co.

[Here follow attestations.]

Above lease filed in the office of the Secretary of State at Trenton, on March 29, 1880, with consent of stockholders.

82 EXHIBIT P 2.

Return by Morris Canal and Banking Co., with Affidavit and Protest, June 1, 1888, and Statement of Real Estate Appended Thereto.

To the State Board of Assessors:

Pursuant to an act of the Legislature of New Jersey, entitled "An act for the taxation of railroad and other canal property," approved April 10th, 1884.

The Morris Canal and Banking Company do herewith return statements and schedules of the property of such company as it existed on the first day of January, 1888.

(Signature) JACOB F. RANDOLPH, *President.*

Remarks.

Together with and in addition to the above return and the schedule thereto annexed, it is hereby returned that the Morris Canal and Banking Co. and the L. V. R. R. Co., lessees of said Canal Co., under a lease between said companies, bearing date May 4th, 1871, claim exemption from taxation under the act entitled an act to revise and amend "An act for the taxation of Railroad and Canal Property approved April 10th, 1884," approved March 27th, 1888, by reason of the provisions of the 4th section of the Charter of the Morris Canal and Banking Co., because by the fourth section of the charter of said Morris Canal and Banking Co., being an act of the Legislature of the State of New Jersey entitled "An act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers," approved December 31st, 1824, and the several supplements thereto, and the various decisions of the Court of Errors and Supreme Court of said state construing the same, all
83 the property of said company mentioned in said copy of the valuation thereof in detail, which is included in said valuation under the designations, respectively of "Main Stem in New Jersey," "Real Estate used for canal purposes other than Main Stem," "Tangible personal property" and the "franchise" are exempt from taxation under the act above referred to and entitled "An act for the taxation of railroad and canal property," and that such exemption extends to and includes the said canal company, and the stocks and estates which have become vested in said company under its said act of incorporation and the several supplements thereto, except that portion of said property included in said valuation which was granted to the said The Morris Canal and Banking Co., by an act of the Legislature of New Jersey, entitled "A further supplement

to the act entitled, 'An act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers,' "- passed December 31st, 1824, which supplement was approved March 14th, 1867; and except also such portions of the property of said company included in said valuation as are not possessed and enjoyed by said company for the actual and necessary purposes of said canal navigation under the said charter and the several supplements thereto, according to the tone, intent and meaning thereof; which last said excepted property is taxable by the local taxing authorities in the several taxing districts where the same is situate and is not taxable under the provisions of the said act for the taxation of railroad and canal property.

JACOB F. RANDOLPH, *President.*

84 STATE OF NEW JERSEY,
County of Essex, ss:

Jacob F. Randolph, being duly sworn, on his oath says: That he is president of the Morris Canal and Banking Company; that the foregoing statements and schedules hereunto annexed, to which he has subscribed his name, are true and correct; that the same contain full and correct statements of the real estate of said company with the value thereof, the depth of water and dimensions of its canal, and length of its canal and feeders in the State of New Jersey, the number, character and value of the locks, buildings and other structures in each taxing district and county of said state, and the floating and movable property of said company; the amount of capital stock of said company authorized, and the number of shares into which said stock is divided; the amount of capital stock paid up; the market value of such shares (or "there being no market value of such shares of stock, the actual value thereof"), on the first day of January, 1888; a correct statement of the total amount of the indebtedness of said company with the details and particulars thereof, as the same existed on the first day of January, 1888, together with a designation of the points where the waterway of said canal exceeds 100 feet in width, and of the property of said company in each taxing district not used for canal purposes and which is locally assessed and taxed, and the value thereof, and a statement of the gross earnings of said company during the year ending January 1st, 1888.

JACOB F. RANDOLPH.

Sworn and subscribed this first day of June, A. D., 1888, before me.

JNO. T. VAN CLEEF,
M. C. C. of New Jersey.

85 *Statement of the real estate of the Morris Canal and Banking Company, giving the depth of water and dimensions of its canal, the length and value of such canal and its feeders in the State of New Jersey and a designation of the points where the water way of such canal exceeds* 100 *feet in width, in any taxing district, together with the value of such excess on the* 1*st day of January,* 1888.

Dimensions:

Say Five (5) feet deep.
" Forty (40) " top water line.
" Ten (10) " flat towing path.
" Ten (10) " berme bank.

Length:

Say in	Warren	County	34.08	miles
"	Morris	"	32.00	"
"	Sussex	"	1.42	"
"	Passaic	"	13.50	"
"	Essex	"	12.00	"
"	Hudson	"	9.15	"
	Total		102.15	miles.

Feeders:

Hopatcong feeder in Morris County leading from Lake Hopatcong into canal (3,650 feet) thirty-six hundred and fifty feet in length. Pompton feeder in Passaic County leading from Pompton River into canal 4 miles and 340 feet, four miles and three hundred and forty feet in length.

Points:

Where water way of canal exceeds 100 feet in width, Jersey City—
Between Washington and Van Vorst streets seven hundred and fifty square feet.
86 Between Van Vorst and Henderson streets, sixty-one hundred square feet.
The two above are shallow waters and not navigable.
Hackensack River one 76-100 acres of which about 20,000 feet are covered with water.
Dover, Randolph Township, Morris County basin about two acres covered with water.
Between Stanhope and Waterloo in Mt. Olive Township, Warren County, 1,600 square feet.
At Port Colden, Mansfield Township, Warren County, in basin, three (3) acres.
At Washington Borough, Warren County, ¼ acre.
At Phillipsburg, ¼ acre.

JACOB RANDOLPH, *President.*

Statement of the number, character and value of all locks of the Morris Canal and Banking Company, and of all buildings and structures of said company, in each county and taxing district of the State of New Jersey, on the 1st day of January, 1888.

Twenty-three	(23)	lift locks.
Eight	(8)	guard "
Two	(2)	feeder "
Total.....	(33)	locks.

30 built of stone.
3 built of timber.
Twenty-three planes.
Coal chutes at Phillipsburg.
Boat yard at Phillipsburg.
All of which are along side of canal and used exclusively for canal purposes.

87 Buildings and structures at locks and planes and intermediate places, are mostly small wooden structures, for lock and plane houses, for tenders' houses or offices, for which we do not receive rent, but are all used for canal purposes.

The wharf and dock bins, north of outer canal basin at Jersey City, are used to discharge our coal and steam and tug boats, etc., etc., except foot of Essex Street, for which we pay a tax to Jersey City.

J. F. RANDOLPH, *President.*

Statement of the property of the Morris Canal and Banking Company not used for canal purposes, and which was locally assessed, taxed in each taxing district of the State of New Jersey on the 1st day of January, 1888, *showing the location and value thereof.*

Bridgewater Township, Somerset County, one dwelling, two story frame building in Somerville, street leading to station	$2,000
Little Falls Township, Passaic County 5 acres of land.....	200
Montville Township, Morris County, lot.....	1,500
Washington Township, Warren County, 3 lots.....	2,500
Washington Borough, Warren County, lots (once boat yard)	1,500
Roxbury Township, Morris County, 40 acres.....	4,000
Newark—house and lot High street, adjacent to Plane House, occupied by plane tender.	

88 Jersey City:

1st Dist.—½ pier foot of Essex street	15,000
Say 500 feet south of basin, with piers, bulkheads and water front (part of state grant), and we pay $25,000 annually to the state	300,000
Six lots, 160x160, east side of Washington street, and is part of state grant	24,000
Block 33, lots 9 to 12	16,500
Lots 2 to 12, bulkhead north side of Morris Canal basin	24,000
Block 68, lot 25, Grant street	10,000
Block 131, lot 100, 102, 104, Gore—Essex street	5,300
Block 131, lot 103, 95 Morris street	10,100
Block 164, lot A, B, C, D, Van Vorst street	6,100
6th Dist.—Block 537, 3 lots Hackensack pump	3,000
6th Dist.—Block 540, 1 lot 14	200

Statement of the floating and movable property of the Morris Canal and Banking Company on the first day of January, 1888, *with the value thereof:*

Canal Boats	15	at $25	$375
	51	" 125	6,375
	38	" 500	19,000
	100	" 175	17,500
	71	" 250	17,750
	27	" 350	9,450
	7	" 300	2,100
	309		$72,550
89 Scows	10	at $25	$250
	5	" 100	500
	5	" 150	750
	6	" 200	1,200
	26		$2,700
Dredgers	2	at $1,200	$2,400
	1	small boat, K. K	300
Horses and Mules—			
	116	mules at $60	$6,960
	27	" " 100	2,700
	11	horses " 125	1,375
			$11,035
	8	wagons at $40	$320
	9	" " 50	450
	2	" " 75	150
	18	carts " 40	720
			$1,640

JACOB F. RANDOLPH, *President.*

Statement of the Morris Canal and Banking Company, showing the amount of capital stock of said company authorized on the first day of January, 1888, *the number of shares into which such capital stock is divided, the amount of capital stock paid up; the market value of such shares (or, "there being no market value, the actual value of such shares"), and the total amount and details and particulars of all indebtedness of said company on the first day of January,* 1888, *together with the gross earnings of said company in the State of New Jersey during the year ending December* 31*st,* 1887:

90 Capital Stock:

Preferred stock ($100 shares, worth $190)	$1,175,000
Common stock ($100 shares, worth $76)	1,025,000

The above is all paid up and represented in shares of $100 each.

Indebtedness:

Divided Script Certificate	$103,164.50
Bonds	1,000,000.00

The market value above named is due solely to the fact that a rental is paid by a lease to the L. V. R. R. Co., and not to earnings of the canal, which is operated at a loss.

Gross earnings of the company during the year ending December 31, 1887, $144,615.47.

JACOB F. RANDOLPH, *President.*

EXHIBIT P. 3.

Return and Appeal and Protest for 1898.

(Offered in evidence, similar to return for 1888, Exhibit P 2 *supra*. Similar returns offered for all years 1888 to 1906).

EXHIBIT P 4.

Return and Protest for 1896.

(Similar to Exhibit P 2, *supra*).

EXHIBIT P 5.

Map of Perth Amboy, Showing Property, Tracks, and Structures of Easton and Amboy Railroad, Dated 1884.

(This refers to L. V. R. R. Co. and has no relation to Morris Canal).

91 EXHIBIT P 6.

Map of Jersey City Terminal, L. V. R. R., Revised General Plan, January 1, 1905, *Showing Condition of the Property.*

EXHIBIT P 7.

Map of Lehigh Valley Terminal Railway, Oak Island Yard, General Location Plan of August, 1899.

(This refers to L. V. R. R. Co., and has no relation to Morris Canal).

EXHIBIT P. 8.

Return and Appeal for 1906.

To the State Board of Assessors of New Jersey:

STATE OF NEW YORK,
County of New York, ss:

E. B. Thomas, being duly sworn according to law, deposes and says that he is the president of the Morris Canal and Banking Company. That he is advised that the property of the Morris Canal and Banking Company is exempt from taxation, as hereinafter stated, and it claims exemption from taxation under the act entitled "An act to revise and amend 'An act for the taxation of railroad and canal property, approved April 10th, 1884,' approved March 27, 1888," by reason of the provisions of the fourth section of the charter of the Morris Canal and Banking Company, being an act
92 of the legislature of the State of New Jersey, entitled "An act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers," approved December 31, 1824, and the several supplements thereto. And he hereby refers to the return made by it for the year 1888 to the state board, for a detailed statement of the property of the company, and in which said claim for exemption is more fully stated, being the same statement referred to in the returns for the succeeding years, except, however, and this deponent particularly states and certifies that from the schedules of the property included within said specified returns hereinabove referred to should be deducted from the property of said company outside of water way in the district of Jersey City, the tract commonly known as the Morris Canal basin having been obtained from the State of New Jersey by virtue of grant under act of the legislature approved March 14th, 1867, which said tract or basin is no longer the property of the said Morris Canal and Banking Company, having been conveyed by it to the Jersey City Terminal Railway Company (now Lehigh Valley Railroad Company of New Jersey), by deed bearing date June 25, 1890; on account of which a deduc-

tion has been made by the state board in their assessment since said conveyance.

E. B. THOMAS,
President Morris Canal and Banking Co.

Subscribed and sworn to at New York this thirteenth day of April, A. D. 1906, before me, a Notary Public, in and for the state and county aforesaid.

(Signed) F. T. HARBACH,
[SEAL.] *Notary Public* (27), *New York County.*

93 *Concurrent Resolutions.*

(1903.)

A concurrent resolution to provide for the appointment of commissioners to examine into and report upon the question of whether legislation shall be enacted permitting the abandonment of navigation on the Morris Canal.

Be it resolved by the General Assembly of the State of New Jersey (the Senate concurring) as follows:

1. The Governor is hereby authorized to appoint three commissioners to fully and exhaustively examine into all the questions involved, including the lands, waters, water rights, rights of flowage and diversion, riparian rights, rights of way and other easements and privileges which are held or claimed by the Morris Canal and Banking Company, or its lessee; how and in what manner the same were acquired, and upon what terms the same are held: what powers and franchises have been granted to said companies, or either of them, and whether said powers and franchises, or any of them, have become exhausted or have been lost by non-users or lapse of time or otherwise; whether said companies, or either of them, should be permitted to retain the property, rights, powers and franchises pertaining to said canal, or to sell or dispose of the same to other persons or corporations, so that the same, or any of them, shall be devoted to other public uses; also to examine into and report the fair value of the canal and its appurtenances, and the said property, rights and franchises, to the said companies, or either of them, and also the fair value thereof to this state; also what supply of potable waters could be gathered and distributed by means of said canal, and from what sources it could be drawn, having due regard to the rights and interests of private persons owning property adjacent to the sources of supply; whether it is expedient for the state to own or
94 control the water supply of the said canal and to use the same for the purpose of supplying municipalities with water on just and equitable terms and upon all other matters properly relating thereto.

2. The said commission shall report to the next legislature whether legislation should be enacted permitting the abandonment

of navigation on the Morris Canal, together with any recommendations bearing thereon; the compensation and expenses of the commission shall be allowed and approved by the Governor, and upon such approval shall be paid by the treasurer, upon the warrant of the comptroller, out of any moneys in the treasury appropriated therefor.

Passed by House of Assembly, and concurred in by Senate, March 31st, 1903.

From report of Commissioners appointed under concurrent resolution of March 31, 1903, to investigate and report upon the abandonment of navigation of the Morris Canal.

In effecting such abandonment or repeal by statute, regard must be had to constitutional limitations and restrictions. The charter of the canal company is a contract between it and the state, which is held to be *property*. The charter contains no provisions (as is generally the case in modern legislation) making it subject to amendment, alteration or repeal at the pleasure of the legislature. This *property* of the company consists of its franchises and tangible assets, and cannot be taken without the consent of every stockholder, or upon just compensation made.

The parties interested in the *property* are:

First. The stockholders of the canal company, the money value of whose interest would be largely, if not definitely, determined by market quotations of the stock. In the case of the canal company stockholders this money value would be easily ascertainable.

95 *Second.* The Lehigh Valley Railroad Company, lessee in perpetuity of the property, subject to its being taken by the state in 1974.

Third. The state, which has reserved to itself the right, in the year 1974, to take the canal and its appurtenances as the sole property of this state.

Joint Resolution No. 6.

(1906.)

Joint resolution directing the Attorney-General to institute proceedings against the Morris Canal and Banking Company and the Lehigh Valley Railroad Company to ascertain the interests of the State of New Jersey, if any, in the tide water basin of one thousand eight hundred and sixty-seven, so called, and to ascertain what right if any the said Lehigh Valley Railroad Company has to operate the Morris Canal and to provide assistant counsel therefor and to provide for the expenses thereof.

Be it resolved by the Senate and General Assembly of the State of New Jersey:

1. That the Attorney General of New Jersey is hereby directed to forthwith institute proceedings in Chancery, or other proper court of this state, against the Morris Canal and Banking Company and

the Lehigh Valley Railroad Company to ascertain what interest, if any the State of New Jersey has in the tide water basin of one thousand eight hundred and sixty-seven, so called, and to ascertain what right, if any, the said Lehigh Valley Railroad Company has to operate the Morris Canal, and to carry on the said proceedings with all possible diligence; and that he shall have power to call to his aid such counsel learned in the law as he may select, in the prosecution of such suits, or of other litigation incident
96 thereto, which may be necessary, and to defray the expenses thereof the sum of ten thousand dollars, *for* so much thereof as may be necessary, is hereby appropriated.

That this resolution shall take effect immediately.

Approved April 9, 1906.

Defendants' Exhibits.

Mortgage by Morris Canal and Banking Company to William Willink, Jr., Dated March 29th, 1830, to Secure $750,000.

Statement.

Court Proceedings on Foreclosure of Willink Mortgage.

[NOTE.—By virtue and in pursuance of the second section of the act of the 28th January, 1830, hereinbefore set forth, the Old Morris Canal and Banking Company, on the 29th day of March, in the same year of 1830, to secure the payment of the sum of $750,000 Wilhelm Willink, Junior, of Amsterdam, executed a mortgage upon the Canal, and also upon the chartered rights of the said company.

The company having neglected to pay the interest upon the mortgage for a length of time, Mr. Willink, on the 20th of October, 1841, filed his bill in the Court of Chancery of New Jersey, to foreclose the mortgage, and on the 14th of October, 1843, the chancellor made a decree in the cause, declaring the rights of the parties. An appeal was taken from that decree to the Court of Appeals, the highest court of judicature of that state, where the decree of the chancellor was affirmed, and the cause remanded to the Court of Chancery, with directions that such decree should be carried into effect. In pursuance of which, the mortgaged premises were sold by the Honorable Ira C. Whitehead, one of the justices of the
97 Supreme Court and a Master in Chancery, and the same were purchased by Asa Whitehead, Benjamin Williamson, and John J. Bryant, Esquires, for one million of dollars, to whom the said master executed the appropriate deed, and gave the requisite receipts for the purchase money, and made his report of the proceedings to said Court of Chancery, all of which will appear by the following papers:]

In Chancery.

Between WILHELM WILLINK, JUNIOR, Complainant,
and
THE MORRIS CANAL AND BANKING COMPANY, THE STATE O Indiana, William C. Noyes, Thomas G. Talmadge, Henry Yate Abraham Richards and David Selden, Defendants.

Interlocutory Decree.

This cause coming on to be heard at a Court of Chancery, held Trenton, in the State of New Jersey, in the term of July, in the ye of our Lord one thousand eight hundred and forty-three, in th presence of Asa Whitehad, solicitor, and of counsel with the co plainant, and of Benjamin Williamson, solicitor, and of counsel wi the State of Indiana, one of the said defendants; the complainant bill having heretofore been ordered to be taken as confessed again the Morris Canal and Banking Company, William C. Noyes, Thom G. Talmadge, Henry Yates, Abraham Richards and David Selde the other defendants; and the bill of complaint of th
98 said complainant, and the answer of the State of Indiana the same, and the evidence, proof and exhibts in the sa clause having been read and heard, and the arguments of couns on both sides having been heard, and time taken to advise thereo And thereupon the chancellor is of opinion, and doth hereby d clare, that the act of the Legislature of the State of New Jers which authorized the giving of the complainant's mortgage, clear contemplated and intended a mortgage on the entire canal, with a its appendages and chartered rights, and that it was the intent the parties to include in said mortgage the entire canal from th Delaware to the Hudson River, and that the said mortgage in i terms and provisions embraces the whole of the said canal to th Hudson River, and everything connected with it, including th part then in a course of completion and not finished, togeth with the feeder which was built as part and parcel of th said canal, and is an appendage to it, and the wharf or pier at Jers City, which was also constructed as an appendage to the said cana And the chancellor being further of opinion, doth declare that th State of Indiana, at the time of the execution of the said bonds an mortgages of the said Morris Canal and Banking Company to th said State of Indiana, had due notice of the existence, nature an extent of the mortgage of the said complainant; and that, und the above recited act of the legislature, the complainant is entitle to have the amount due on his said mortgage raised by sale of th whole of the said mortgaged premises, including the charter rights and privileges of the said Morris Canal and Banking Co pany, according to the prayer of his bill; and that his said mortga is a first lien, and first to be satisfied out of the said premises, an that the balance, if any, be appropriated to the payment of th mortgages of the said State of Indiana. Whereupon it is now, o

this fourteenth day of October, in the year of our Lord one
99 thousand eight hundred and forty-three, by his Excellency William Pennington, governor and chancellor of the State of New Jersey, ordered, that it be referred to Theodore Frelinghuysen, Junior, one of the masters of this court, to ascertain, and report the amount due to the said complainant, upon the mortgage held by him upon the premises mentioned and described in the said bill of complaint; and also the amount due, if anything, to the said State of Indiana upon the second mortgages, and to report accordingly; and that he make his report with all convenient speed.

(Signed) WM. PENNINGTON, *C.*

Decree of Affirmance.

In the Court of Appeals of the State of New Jersey, May Term, 1844.

Between THE STATE OF INDIANA, Appellant,
and
WILHELM WILLINK, JR., Respondent.

On Appeal from the Decree of the Chancellor Made in This Cause.

MAY 22, 1844.

This cause being regularly noticed for hearing at this time, and the same being called *on* for argument in the presence of the respective solicitors and counsel of the appellants and respondents, it is ordered and decreed, and this court doth accordingly order and decree that the decree of the Court of Chancery complained of by the appellant, be and the same is hereby in all things affirmed with costs to be taxed. And it is further ordered that the said cause be, and the same is hereby remitted to the
100 Court of Chancery, to be proceeded upon according to law and the course and practice of said court.

On motion of Asa Whitehead, solicitor, and of counsel with the respondents—

I do hereby certify the foregoing to be a true copy of a decree entered in the Court of Appeals of the State of New Jersey, on the 22d day of May, 1844, in the cause above stated.

(Signed) CHARLES G. M'CHESNEY,
Cerk of Appeals.

Master's Deed, October 21, 1844.

To all persons to whom these presents shall come or may concern I Ira C. Whitehead, one of the masters of the Court of Chancery of the State of New Jersey, send greeting:

Whereas, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and forty-four, a certain writ of *fieri facias* was issued out of the said Court of Chancery, directed and delivered to me, then and still being one of the masters of the

said Court of Chancery, and which said writ is in the words or t
the effect following, that is to say:

NEW JERSEY, *To wit:*

The State of New Jersey to Ira C. Whitehead, Esq., one of the master
of the Court of Chancery of the State of New Jersey, Greeting:

Whereas, on the tenth day of July, in the year of our Lord on
thousand eight hundred and forty-four, by a certain decree mad
in our Court of Chancery, before our governor and chancellor a
Trenton, in a certain cause therein depending, wherein Willia
Willink, Jr., is complainant, and the Morris Canal and Bankin
Company, the State of Indiana, William Curtis Noyes
101 Thomas G. Talmadge, Henry Yates, Abraham Richards an
David Selden, are defendants, it was ordered, adjudged an
decreed, that all and singular the premises mentioned and include
in the complainant's mortgage—that is to say, all and singular th
Morris Canal, so called, being the canal authorized by the laws o
the State of New Jersey, as the said canal had at the time of th
execution of the said indenture of mortgage been laid out through
the several counties of Warren, Sussex, Morris, Essex and Bergen, i
the said state, and was then in a course of completion from th
Delaware to the Hudson River, together with all and singular th
dams, aqueducts, locks and planes, culverts, bridges, towing paths
embankments, basins, wharves, docks, waters, water-courses, ma
chinery, privileges, appendages and appurtenances, thereto belong
ing or appertaining; and also all the chartered rights of the said
company, and all the tolls, income and revenue and profits accruing
or to accrue or arise from the said canal; and also all the lands, tene
ments and other properties of the Morris Canal and Banking Com
pany whatsoever and wheresoever, and the reversion and reversions
and the remainder and remainders, rents, issues and profits thereof
and of every part and parcel thereof; and all the estate, rights, title
interest, property, claim and demand, as well in law as in equity
of the said The Morris Canal and Banking Company, of, in and to
the same and every part and parcel thereof. And together also with
the feeder which was built as part and parcel of the said canal and
is an appendage thereto, and the wharf or pier at Jersey City, which
was also built and constructed as an appendage to the said canal
and ordered to be sold by the said decree, be sold to pay and satisfy
in the first place to the complainant the sum of eight hundred and
fifty-five thousand six hundred and twenty-five dollars, due to the
complainant on said mortgage, with the lawful interest thereon, to
be computed from the twenty-fifth day of October, in the year of
our Lord one thousand eight hundred and forty-three, being
102 the date of the master's report in the said case, with the
complainant's costs, to be taxed, and the interest thereon
from the date of the said decree; and in the next place to pay and
satisfy to the State of Indiana the sum of one million nine hundred
and thirty-five thousand six hundred and sixty-one dollars and
seventy-nine cents, the amount reported to be due to her on her sev-

eral mortgages, with the lawful interest on the same from the twenty-fifth day of October, eighteen hundred and forty-three, the date of the said master's report, and also the sum of two hundred and sixty thousand dollars which will become due to the said State of Indiana on her said several mortgages on the first day of October, in the year of our Lord one thousand eight hundred and forty-four, making a rebate on said last mentioned sum of the lawful interest thereon from the day of payment thereof, until the said first day of October, eighteen hundred and forty-four, and also the costs of the said State of Indiana, to be taxed, with the lawful interest thereon from the date of the said decree, and that a writ of *fieri facias* should issue for that purpose out of said court, directed to Ira C. Whitehead, one of the masters of the said court, commanding him to make sale according to law, of all and singular the mortgaged premises aforesaid, and that out of the money arising from such sale, he first to pay to the complainant or to his solicitor the said sum of eight hundred and fifty-five thousand six hundred and twenty-five dollars, due to him as aforesaid, with the interest thereon as aforesaid, and also his costs of the said suit to be taxed with the interest thereon as aforesaid, and that he then pay to the said State of Indiana, or to her solicitor, the said sum of one million nine hundred and thirty-five thousand six hundred and sixty-one dollars and seventy-nine cents, with the interest thereon as aforesaid, and also the said sum of two hundred and sixty thousand dollars, the sum which will become due to her on the first day of October, eighteen
103 hundred and forty-four as aforesaid, making a rebate of interest thereon as aforesaid, and also her costs of the said suit to be taxed as aforesaid; and that the residue of the moneys arising from such sale, after making the payments aforesaid, and if any there shall be, be brought into the said court to abide the further order of the said court, unless the said court shall otherwise previously order, and that the said master make return and report of his proceedings by virtue of the said execution with all convenient speed, as by the said decree remaining as of record in our said Court of Chancery at Trenton, doth and may more fully appear.

And whereas the costs of the said complainant have been duly taxed at the sum of two hundred and ninety-four dollars and fifty-three cents, and the costs of the said State of Indiana have been duly taxed at the sum of one hundred and ninety-three dollars and ninety-three cents: Therefore, you are hereby commanded that you make sale according to law, of all and singular the mortgaged premises aforesaid, and that out of the money arising from such sale you first pay to the complainant or to his solicitor the sum of eight hundred and fifty-five thousand six hundred and twenty-five dollars, due to him as aforesaid, with the interest thereon as aforesaid, and also the said sum of two hundred and ninety-four dollars and fifty-three cents of costs with interest thereon as aforesaid. And that you then pay to the said State of Indiana, or to her solicitor, the said sum of one million nine hundred and thirty-five thousand six hundred and sixty-one dollars and seventy-nine cents, with the interest thereon as aforesaid; and also the said sum of two hundred

and sixty thousand dollars—the sum which will become due to her on the first day of October, eighteen hundred and forty-four as aforesaid, making a rebate of interest thereon as aforesaid; and also the said sum of one hundred and ninety-three dollars and twenty-three cents of costs, with the interest thereon as aforesaid; and that you bring into the said court the residue of the
104 moneys arising from the said sale, after making the payments aforesaid, if any there shall be, to abide the further order of the said court, unless the said court shall otherwise previously order, and that you make return and report by certificate under your hand to our said Court of Chancery at Trenton, on the fourth Tuesday of October next, of your proceedings, by virtue of this writ, together with this writ.

Witness, Daniel Haines, Esq., our governor and chancellor at Trenton aforesaid, the thirteenth day of August, in the year of our Lord, one thousand eight hundred and forty-four.

(Signed) ASA WHITEHEAD,
Solicitor for Complainant.

SAMUEL R. GUMMERE, *Clerk.*

As by the record of the said writ of *fieri facias* in the clerk's office of the Court of Chancery of the State of New Jersey, in book 2 of Executions, page 447, may more fully and at large appear.

And whereas I, the said Ira C. Whitehead, as such master as aforesaid, did, in due form of law advertise the said mortgaged premises in the said writ of *fieri facias*, mentioned and described to be sold by virtue of the said final decree, and of the said writ of *fieri facias* at public vendue, to be held at Chandler's hotel, in the east ward of the City of Newark, called the Park House, on Monday, the twenty-first day of October, in the year of our Lord one thousand eight hundred and forty-four, at two o'clock in the afternoon of said day, at which time and place I did accordingly offer and expose the said mortgaged premises in said writ of *fieri facias* mentioned and described for sale at public vendue, under and by virtue of the said writ of *fieri facias;* and thereupon Benjamin Williamson, Asa Whitehead, and John J. Bryant, all of the County of Essex and State aforesaid, did then and there bid for the same the sum of one million of dollars; and no other person bidding as much,
105 I did then and there, openly and publicly, in due form of law, and between the hours of two and five in the afternoon strike off and sell the said mortgaged premises in the said writ of *fieri facias* mentioned and described, for the said sum of one million dollars, to the said Benjamin Williamson, Asa Whitehead and John J. Bryant, they being then and there the highest bidders for the same.

Now, therefore, know ye, that I, the said Ira C. Whitehead, as such master as aforesaid, under and by virtue of the said writ of *fieri facias*, and in execution of the power and trust in me reposed, and also for and in consideration of the said sum of one million of dollars to me in hand paid, the receipt whereof I do hereby ac-

knowledge, and therefrom acquit, exonerate, and forever discharge the said Benjamin Williamson, Asa Whitehead, and John J. Bryant, have granted, bargained, sold, assigned, transferred, and conveyed, and by these presents do grant, bargain, sell, assign, transfer and convey unto the said Benjamin Williamson, Asa Whitehead, and John J. Bryant, their heirs and assigns, all and singular the said mortgaged premises in the said writ of *fieri facias* mentioned and described, that is to say: All and singular the Morris Canal, so called, being the canal authorized by the laws of the State of New Jersey, as the said canal had, at the time of the execution of the indenture of mortgage of complainant in the said cause, been laid out through the several counties of Warren, Sussex, Morris, Essex and Bergen, in the said State of New Jersey, and was then in a course of completion from the Delaware to the Hudson River, together with all and singular, the dams, aqueducts, locks, planes, culverts, bridges, towing-paths, embankments, basins, wharves, docks, waters, water-courses, machinery, privileges, appendages and appurtenances thereto belonging or appertaining; and also all the chartered rights of the said company, and also all the tolls, income, revenue, and profits accruing or to accrue or arise from the
106 said land; and also all the lands, tenements, and other properties of the Morris Canal and Banking Company, whatsoever and wheresoever, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof, and all the estate, right, title, interest, property, claim, and demand, as well in law as in equity, of the said The Morris Canal and Banking Company, of, in, and to the same, and every part and parcel thereof; and together also with the feeder which was built as part and parcel of the said canal, and is an appendage thereto, and the wharf or pier at Jersey City, which was also built and constructed as an appendage to the said canal, and ordered to be sold by the said decree. To have and to hold the same unto the said Benjamin Williamson, Asa Whitehead, and John J. Bryant, their heirs and assigns, to their only proper use and benefit, and behoof of the said Benjamin Williamson, Asa Whitehead and John J. Bryant, their heirs and assigns forever, in as full, ample, and beneficial manner as by virtue of the said writ of *fieri facias* I may, can, or ought to convey the same.

And I, the said Ira C. Whitehead, for myself, my heirs, executors and administrators, do hereby covenant, promise and agree to and with the said Benjamin Williamson, Asa Whitehead and John J. Bryant, their heirs and assigns, that I have not, as such master as aforesaid, done or caused, suffered or procured to be done any act, matter or thing, whereby or by means whereof the estate hereby conveyed or intended so to be, in and to the said mortgaged premises may or can be changed, charged, altered, encumbered or defeated in any way whatsoever.

107 In witness whereof, I, the said Ira C. Whitehead, as such master as aforesaid, have hereunto set my hand and seal

the twenty-first day of October, in the year of our Lord one thousand eight hundred and forty-four.

(Signed) IRA C. WHITEHEAD. [L. S.]

Signed, sealed and delivered in the presence of
JOSEPH C. HORNBLOWER.

(Acknowledged Nov. 2, 1844, before Joseph C. Hornblower, Chief Justice).

108 *Master's Return to Execution.*

In Chancery of New Jersey.

Between WILHELM WILLINK, JUNIOR, Complainant, and THE MORRIS CANAL AND BANKING COMPANY, THE STATE OF INDIANA, and Others, Defendants.

On Final Decree and Execution for Sale of Mortgaged Premises.

The following are copies of the master's return of the execution, and of the receipt of the solicitor of the complainant, *at* the solicitor of Indiana:

I, Ira C. Whitehead, the master named in the foregoing writ, do certify that by virtue of the said writ, I did advertise according to law the mortgaged premises therein described to be sold at public vendue and outcry, on the twenty-first day of October, eighteen hundred and forty-four, at two o'clock in the afternoon, at Chandler's hotel, in the east ward of the City of Newark, known by the name of the Park House, at which time and place I did expose the said premises for sale by public vendue and outcry: and thereupon Benjamin Williamson, Asa Whitehead, and John J. Bryant, all of the county of Essex and State of New Jersey, having then and there bid for the same the sum of one million of dollars, and no person bidding as much or more for the said premises, the same were then and there by me, between the hours of two and five o'clock in the afternoon, openly and publicly struck off and sold to the said Benjamin Williamson, Asa Whitehead, and John J. Bryant. And

I do further certify that I have made, executed and delivered
109 to the said Benjamin Williamson, Asa Whitehead, and John J. Bryant, a deed for the said premises according to law: have received from them the said sum of one million of dollars; of which sum I have paid to Asa Whitehead, solicitor for the complainant, nine hundred and eight thousand four hundred and three dollars and thirty-seven cents, the amount this day due to the complainant, on the decree for debt, interest and cost; and to Benjamin Williamson, solicitor for the State of Indiana, the balance of the said purchase money, amounting to ninety-one thousand five hundred and ninety-six dollars and sixty-three cents. I have received from them the sum of three hundred and twelve dollars and fifty cents, accepted

by me as my master's fees on said sale, and the further sum of one hundred and eleven dollars and ninety-one cents for the expense of advertising in the several newspapers printed and published in the counties of Warren, Sussex, Morris, Essex, Passaic and Hudson; special messengers putting up notices of the sale in the different townships in the said several counties through which the canal passes, deed, &c., and which was assented to by the respective solicitors. All which I do certify and report to the Court of Chancery as by the said writ I am commanded.

Witness my hand, this second day of November, eighteen hundred and forty-four.

(Signed) IRA C. WHITEHEAD,
Master in Chancery.

Ira C. Whitehead, the master above named, has this day paid to us, the solicitors of the parties above named, the several sums mentioned by him in the above certificate and return, being the full amount of the moneys raised by the sale of the mortgaged premises.

Nov. 2, 1844.

(Signed) ASA WHITEHEAD,
Solicitor for Complainant.

(Signed) B. WILLIAMSON,
Solicitor for the State of Indiana.

110 *Opinion.*

(Filed January 13, 1908.)

New Jersey Supreme Court, February Term, 1907.

Branch Court List, No. 102.

MORRIS CANAL & BANKING COMPANY & LEHIGH VALLEY RAILROAD COMPANY, Lessee, Prosecutor-,
vs.
STATE BOARD OF ASSESSORS et al., Respondents.

On Certiorari.

Before Justices Hendrickson and Pitney.

For the prosecutor-, William H. Corbin.

For the respondents, Robert H. McCarter, Attorney General; Bennet Van Syckel and John R. Hardin.

Per Curiam:

The tax under review herein should be affirmed, with costs.

111 *Assignments of Error.*

(Filed April 13, 1908.)

New Jersey Court of Errors and Appeals.

MORRIS CANAL AND BANKING COMPANY and LEHIGH VALLEY RAILROAD COMPANY, Lessee, Prosecutors, Plaintiffs in Error,
vs.
DAVID BAIRD et als., STATE BOARD OF ASSESSORS, and J. WILLARD Morgan, Comptroller, Defendants in Error.

On Error to Supreme Court.

Afterwards, that is to say, on the ninth day of April, in the year of our Lord, one thousand nine hundred and eight, in the Court of Errors and Appeals in the last resort in all causes, come the said Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, by Collins & Corbin their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. That by the record aforesaid it appears that the judgment in form aforesaid was given for the said David Baird and others, defendants, against the Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, prosecutors, whereas, by the law of the land, judgment ought to have been given for the said Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, prosecutors, and against the said David Baird and others, defendants.

2. That by the record aforesaid it appears that the judg-
112 ment in form aforesaid affirmed the tax brought up for review by writ of certiorari therein referred to and dismissed the said writ of certiorari with costs, whereas, by the law of the land, judgment ought to have been given annulling, setting aside and for nothing holding the said tax and sustaining the said writ of certiorari.

3. That by the record aforesaid it appears that the tax affirmed by the said judgment was levied and imposed in violation of Paragraph 12 of Section VII of Article IV of the Constitution of the State of New Jersey, which requires that property shall be assessed for taxes under general laws and by uniform rules according to its true value.

4. That by the record aforesaid it appears that the tax affirmed by the said judgment was levied and imposed in violation of the first section of the fourteenth amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

5. That by the record aforesaid it appears that the tax affirmed by the said judgment was levied and imposed under acts of the legislature of the State of New Jersey passed in violation of the provisions

of the Constitution of the State of New Jersey referred to in the third assignment of error, and of the provisions of the Constitution of the United States referred to in the fourth assignment of error.

6. That by the record aforesaid it appears that the assessment affirmed is made upon a part only of the property used for canal purposes of the plaintiffs in error, and that the residue of such property is assessed by local assessors, whereby the said property of plaintiffs in error is not assesed under uniform rules.

7. That by the record aforeaid it appears that the assess-
113 ment affirmed of the property used for canal purposes of plaintiffs in error is made in part pursuant to special statutes, and not under general laws.

8. That by the record aforesaid it appears that the assessment which was affirmed was not made according to the true value of the property.

9. That by the record aforesaid it appears that the property of the plaintiffs in error, the assessment and taxes upon which are brought up by these proceedings, is possessed, occupied and used by the plaintiffs in error for the actual and necessary purposes of canal navigation under their charters, and is exempt from taxation by virtue of the provisions of the following acts.

1. An act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers, passed December 31st, 1824.

2. An act to authorize the Morris Canal and Banking Company to extend the Morris Canal to the waters of the Hudson, passed January 26th, 1828, and the acts amendatory and supplementary to said acts.

Which said acts and the acceptance thereof by the plaintiffs in error constitute an irrepealable contract between the State of New Jersey and the plaintiffs in error, whereby, the said property, the assessment and taxes upon which are brought up by these proceedings, is exempt from taxation, as in the fourth section of said first mentioned act of December 31st, 1824, explicitly provided; and the said act of the Legislature of New Jersey, passed March 27th, 1888, and the supplements thereto and acts amendatory thereof, are void so far as they affect the plaintiffs in error and their said property, because they impair the obligation of the said irrepealable contract of exemption from taxation, in violation of Paragraph 3, Section VII, of Article IV, of the Constitution of the State of New Jersey, and of Paragraph 1, Section 10, of Article I, of the Constitution of the United States.

114 Therefore, the said Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, pray that the judgment aforesaid, by reason of the aforesaid errors and of other errors appearing on the record and proceedings aforesaid, be reversed, annulled and held for nothing, and that the Morris Canal and Banking Company and Lehigh Valley Railroad Company, lessee, be restored to all things that they have lost on occasion of the said judgment, &c.

COLLINS & CORBIN,
Attorneys for and of Counsel with Plaintiffs in Error.

Service of a copy of the assignments of error in above cause i hereby acknowledged this thirteenth day of April, nineteen hundre and eight.

ROBERT H. McCARTER,
Attorney of Defendants in Error.

115 *Joinder in Error.*

(Filed April 15, 1908.)

New Jersey Court of Errors and Appeals.

MORRIS CANAL & BAKING COMPANY et al., Prosecutors, Plaintiff in Error,
vs.
DAVID BAIRD et als., STATE BOARD OF ASSESSORS, and J. WILLARD MORGAN, Comptroller, Defendants in Error.

On Error to the Supreme Court.

And hereupon afterwards, to wit, on the fifteenth day of April in the year of our Lord, one thousand nine hundred and eight, th said defendants in error, by Robert H. McCarter, Attorney Genera of the State of New Jersey, comes into court and says that there is n error either in the record and proceedings aforesaid, or in giving th judgment aforesaid, and prays here that the court may proceed t examine as well the record and proceedings aforesaid as the matter aforesaid assigned for error, and that the judgment aforesaid, i manner aforesaid given, may, in all things, be affirmed.

ROBERT H. McCARTER,
Attorney General of the State of New Jersey,
Attorney for Defendants in Error.

116 State of New Jersey Court of Errors and Appeals, June Term, 1908. In Error.

No. 99 of June Term, 1908.

MORRIS CANAL AND BANKING CO. et al.
and
DAVID BAIRD et al., STATE BOARD OF ASSESSORS.

Date Novem. 16th, 1908.
Chief Justice presiding.
Opinion by Chief Justice.

Check List.

	Affirm.	Rev'd.
The Chancellor	...	...
" Chief Justice	1	...
Mr. Justice Garrison	1	...
" " Swayze	1	...
" " Reed	1	...
" " Trenchard	1	...
" " Parker	1	...
" " Bergen	1	...
" " Voorhees	1	...
" " Minturn	1	...
Judge Bogert	1	...
" Vredenburgh	1	...
" Vroom	1	...
" Green	1	...
" Gray	1	...
" Dill	1	...
Totals	15	...

[Endorsed:] Filed Nov. 16, 1908. S. D. Dickinson, Clerk.

117 New Jersey Court of Errors & Appeals.

No. 99, June Term, 1908.

MORRIS CANAL & BANKING COMPANY and LEHIGH VALLEY RAILROAD COMPANY
vs.
STATE BOARD OF ASSESSORS.

Writ of Error to Supreme Court.

For Plaintiffs in Error, William H. Corbin.
For Defendants in Error, Robert H. McCarter, Attorney General, Bennet Van Syckel and John R. Hardin.

The opinion of the court was delivered by GRUMMERE, C. J.:

The judgment brought before us by this writ of error sustains the validity of a tax levied by the State Board of Assessors upon the

canal and its appurtenances of the Morris Canal & Banking Company, under the railroad and canal tax act of 1884 and its supplements. The sole question for determination is whether the property taxed is exempt under the taxing provision contained in the charter of the company. That provision is found in the fourth section of the charter, and is as follows:

"No state, county, township, or other public assessments, taxes or charges whatsoever shall at any time be laid or imposed upon the said canal company, or upon the stocks and estates which may become vested in them under this act; but this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for
118 the actual and necessary purposes of said canal navigation under this act, according to the true intent and meaning thereof." P. L. 1824, p. 158.

That this charter provision constituted a contract between the state and the corporation which cannot be annulled or altered by the state, without the consent of the corporation, is conceded by the Attorney General and his associates.

In the year 1871 the canal company leased its property and franchises to the Lehigh Valley Railroad Company in perpetuity, under authority of a supplement to its charter passed in that year, which provided that "it shall and may be lawful for the Morris Canal & Banking Company, by and with the consent of a majority in interest of the stockholders of said company, expressed in writing and duly authenticated by affidavit and filed in the office of the Secretary of State, to lease the canal of said company, or any part thereof, with all or any of its boats, property, works, appurtenances and franchises, to any person or persons, or corporation, either perpetually or for such shorter time, and upon such terms and agreements as may be agreed upon between the said contracting parties; and it shall be lawful for the lessee, or the lessees, under said lease, to use and enjoy the said property and franchises so demised for the term in said lease mentioned." P. L., p. 444. The lease itself not only demised the canal with its appurtenances, and all the corporate franchises of the canal company, except that of the incorporation, but also assigned all of the corporate rights and privileges then held, or thereafter to be acquired, by the canal company.

The contention on the part of the State is that the effect of this lease was to put an end to the immunity from taxation
119 theretofore enjoyed by the Morris Canal Company upon its canal and appurtenances, and to subject that property thereafter to the operation of such general laws as should impose taxes upon railroad and canal property. On the other hand, the plaintiffs in error deny that this was the effect of the lease, and assert that this instrument, by the clause assigning to the lessee all corporate rights and privileges of the canal company, preserved that immunity in its completeness, and transferred its enjoyment to the Lehigh Valley Railroad Company.

Immunity from taxation is sometimes a personal privilege, and sometimes a privilege annexed to property as an appurtenant to it,

When it is a personal privilege it is incapable of transfer without express statutory direction. Morgan v. Louisiana, 93 U. S. 223. When it is annexed to property it passes with the grant of that property as an appurtenant to it. New Jersey v. Wilson, 7 Cranch. 164. The charter provision now under consideration exempts both the canal company and the stocks and estates which may become vested in it, and so would seem to confer a privilege, not only personal, but also annexed to the property of the company. So far as it is personal the clause in the lease to which we have referred did not, in our judgment, operate to transfer it to the lessee company, for we find nothing contained in the legislative authorization to the canal company to lease its property and franchises which can be construed into a consent by the State that this personal privilege granted to the canal company should be passed by it to its lessee.

Nor does it seem to us that this immunity passed to the Lehigh Valley Company as an appurtenant to the property leased to it. Although a contract of exemption from taxation is valid, yet its provisions are to be construed most strongly against him who claims the benefit of it. Where it exists it is to be rigidly scrutinized,
120 and never permitted to extend either in scope or duration beyond what the terms of the concession clearly require. It is in derrogation of public right, and narows a trust created for the good of all. Tucker v. Ferguson, 89 U. S. 527; Memphis Railroad Co. v. Commissioner, 112 U. S. 617; State Board of Assessors v. Morris & Essex R. R. Co., 20 Vr. 199; Sisters of Charity of St. Elizabeth v. Cory, Collector, 44 Vr. 699. The present charter contract does not provide for a perpetual immunity from taxation. It declares that the 'exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of canal navigation." The meaning of this limitation, in view of the principle thus quoted, seems to us to be clear. By force of it the property of the company is relieved from taxation only so long as it is possessed by the company, occupied by the company, and used by the company. When any one of these three conditions ceases to exist the immunity from taxation granted by the charter comes to an end. The effect of the lease to the Lehigh Valley Railroad Company was to pass to it the possession of the leased property, with the full right to occupy and use the same. Since that lease went into effect the Morris Canal Company has neither possessed, occupied or used any part of that property, and so long as that property remains out of its possession, so long as it ceases to occupy and use it, the immunity from taxation conferred upon it and its property by the charter provision under consideration is suspended. Whether, in case the lease should be terminated by the default of the lessee, or otherwise, and the property should thereby revert to the lessor, and be thereafter occupied and used by it, this grant of immunity will be revived, is not before us for determination. It is enough to say that, under present conditions, the Morris Canal, with its appurtenances, is subject to taxation under the railroad and canal tax act of 1884.

The judgment under review will be affirmed.

Endorsed: "Filed Nov. 16, 1908. S. D. Dickinson, Clerk."

[Endorsed:] State of New Jersey, Department of State, Comparing and Certifying Division. Copy correct. Compared by Struble. Original Read by Shepherd. J. L. Hendricks, In charge of Division.

121 New Jersey Court of Errors and Appeals, June Term, 1908.

Between

MORRIS CANAL & BANKING COMPANY, Pl't'ff in Error,

vs.

STATE BOARD OF ASSESSORS, Def't in Error.

In Error to Supreme Court.

Order on Affirmance of Judgment.

This cause having been duly argued at the June Term 1908 of this court by William H. Corbin, of counsel for the plaintiff in error, and Robert H. McCarter, Attorney General, of counsel for the defendant in error, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this Sixteenth day of November in the year of our Lord one thousand nine hundred and eight ordered and adjudged that the judgment of the Supreme Court, removed by the writ of error in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

ROB'T H. McCARTER, *Attorney General,*
Attorney of Defendant in Error.

122 [Endorsed:] New Jersey Court of Errors and Appeals, June Term, 1908. Morris Canal & Banking Company, Pl't'ff in Error, vs. State Board of Assessors, Def't in Error. In Error to Supreme Court. Order Affirming Judgment. Rob't H. McCarter, Attorney General, Att'y. Filed Dec. 1, 1908. S. D. Dickinson, Clerk.

DEPARTMENT OF STATE.

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and *ex officio* Clerk of the Court of Errors and Appeals in the Last Resort in all Causes, *do hereby certify*, that the foregoing is a true copy of an order made by said Court in the above-stated cause, dated November 16, 1908, as the same is taken from and compared with the Minutes of said Court.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal, at Trenton, this Third day of December A. D. 1908.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON,
Secretary of State.

123 New Jersey Court of Errors and Appeals.

MORRIS CANAL AND BANKING COMPANY and LEHIGH VALLEY RAILROAD COMPANY, Lessee (Prosecutors), Plaintiffs in Error,

v.

DAVID BAIRD, STEPHEN J. MEEKER, THEODORE STRONG, and ECKARD P. BUDD, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State (Defendants), Defendants in Error.

Petition for Writ of Error.

Morris Canal and Banking Company and Lehigh Valley Railroad Company, Plaintiffs-in-Error in above entitled cause, feeling aggrieved by the judgment of this Court entered on the First day of December, 1908, affirming the final judgment of the Supreme Court of the State of New Jersey herein dated the Thirteenth day of February, 1908, come now, by Collins & Corbin, their Attorneys and show that there was drawn in question on the hearing of said cause the validity of an Act of the Legislature of the State of New Jersey, entitled: "An Act to revise and amend an act for the taxation of railroad and canal property," approved April 10th, 1884, (which revision and amendment was approved March 27th, 1888,) and the several acts amendatory thereof and supplementary thereto, and that the validity of said act was disputed by the Plaintiffs-in-Error on the ground that said act and the supplements thereto and acts amendatory thereof are void, so far as they affect the plain-

124 tiffs-in-error and their property, because they impair the obligation of the irrepealable contract of exemption from taxation contained in an Act of the Legislature of the State of New Jersey entitled: "An Act to incorporate a Company to form an artificial navigation between the Passaic and Delaware Rivers" passed December 31st, 1824, and in an Act entitled: "An Act to authorize the Morris Canal and Banking Company to extend the Morris Canal to the waters of the Hudson," passed January 26th, 1828, and the acts amendatory and supplementary to said act; and that said Act of March 27th, 1888, and the said supplements thereto and amendments thereof are in violation of the Constitution of the United States.

And your petitioners show that by the said judgment the said statutes were sustained and enforced against the plaintiffs-in-error.

And your petitioners show that there was drawn in question in said cause the construction of certain clauses of the Constitution of the United States, and that the plaintiffs-in-error asserted the right, privilege and immunity of exemption from taxation granted to them by the State of New Jersey by the contract contained in the aforementioned Acts of the Legislature of the State of New Jersey passed December 31st, 1824, and January 26th, 1828, and that by the judgment aforesaid the tax levied by the State of New Jersey, and brought up in this cause, was affirmed, although levied in violation of the terms of the aforesaid contract of exemption and im-

munity, in violation of the provisions of the Constitution of the United States forbidding the passage of any law impairing the obligation of contracts.

125 And your petitioners pray said Court for an order allowing your petitioners to prosecute a Writ of Error to the United States Supreme Court, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which your petitioners shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this Court shall be suspended and stayed until the determination of said Writ of Error by the United States Supreme Court.

And, your petitioners will ever pray, &c.

COLLINS & CORBIN,
Attorneys of Petitioners.

126 [Endorsed:] 873. New Jersey Court of Errors and Appeals. Morris Canal and Banking Company and Lehigh Valley Railroad Company, Lessee, (Pros.), Pl'ffs-in-Error, v. David Baird, et als., State Board of Assessors, etc., et al., (Def'ts.) Def'ts-in-Error. Petition for writ of error. Collins & Corbin, Att'ys for Pl'ffs. Filed Dec. 3, 1908. S. D. Dickinson, Clerk.

127 New Jersey Court of Errors and Appeals.

MORRIS CANAL AND BANKING COMPANY and LEHIGH VALLEY RAILROAD COMPANY, Lessee (Prosecutors), Plaintiffs in Error,

v.

DAVID BAIRD, STEPHEN J. MEEKER, THEODORE STRONG, and ECKARD P. BUDD, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State (Defendants), Defendants in Error.

Assignments of Error.

Morris Canal and Banking Company and Lehigh Valley Railroad Company, by Collins & Corbin, their Attorneys, come and file the following Assignments of Error upon which they will rely, and say:

That in the record and proceedings in the above cause there is manifest error in this, that by the record aforesaid it appears that the judgment herein was given in favor of the defendants and against the prosecutors, and that by the judgment of said Court of Errors and Appeals the final judgment of the New Jersey Supreme Court was affirmed, whereby the tax brought up by the writ of certiorari herein, being the tax of $51,221.27 levied, laid and imposed by the defendants for the year 1906, upon the property of the said plaintiffs-in-error, possessed, occupied and used by them for the actual and necessary purposes of their canal navigation under the Act of December 31st, 1824, was affirmed, whereas, by the law of the land,

the said judgment ought to have been reversed, and the said
128 tax ought to have been set aside with costs, and judgment of reversal ought to have been given for the plaintiffs-in-error, Morris Canal and Banking Company and Lehigh Valley Railroad Company of New Jersey, against David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State, being the defendants in error; and that there is error in this, that by the said judgment the said Act of the Legislature of the State of New Jersey, entitled: "An Act to revise and amend an act for the taxation of railroad and canal property," approved April 10th, 1884, (which revision and amendment was approved March 27th, 1888), is sustained and enforced against these plaintiffs-in-error, whereas the same ought to have been held to be void as against the plaintiffs-in-error and their property, because it is an attempt to impair the obligation of the contract made between the State of New Jersey and the Morris Canal and Banking Company in and by the act entitled: "An Act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers," passed December 31, 1824, and the act of the said Legislature, entitled: "An Act to authorize the Morris Canal and Banking Company to extend the Morris Canal to the waters of the Hudson," passed January 26th, 1828, and is in violation of the Constitution of the United States; and the Morris Canal and Banking Company and Lehigh Valley Railroad Company pray that the judgment aforesaid may be reversed, annulled and for nothing holden, and that the said tax may be reversed and set aside, and that they may be restored to all things which they have lost by occasion of said judgment.

COLLINS & CORBIN,
Attorneys for Plaintiffs in Error.

129 [Endorsed:] New Jersey Court of Errors and Appeals. Morris Canal and Banking Company and Lehigh Valley Railroad Company, Lessee, (Pros.), Pl'ffs-in-Error, v. David Baird, et als., State Board of Assessors, etc., et al., (Def'ts) Def'ts-in-Error. Assignments of error. Collins & Corbin, Attorneys. Filed Dec. 3, 1908. S. D. Dickinson, Clerk.

130 New Jersey Court of Errors and Appeals.

MORRIS CANAL AND BANKING COMPANY and LEHIGH VALLEY RAILROAD COMPANY, Lessee (Prosecutors), Plaintiffs-in-Error,

v.

DAVID BAIRD, STEPHEN J. MEEKER, THEODORE STRONG, and ECKARD P. BUDD, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State (Defendants), Defendants-in-Error.

Order Allowing Writ of Error.

Upon reading and filing petition for Writ of Error and Assignments of Error to review the judgment entered in the above entitled

cause affirming the final judgment of the New Jersey Supreme Court dated February 13th, 1908:

It is ordered, that a Writ of Error be and hereby is allowed to have reviewed in the United States Supreme Court the said judgment heretofore entered herein, and that the amount of bond on said Writ of Error be and hereby is fixed at Five hundred dollars.

Dated, December 3, 1908.

MAHLON PITNEY,
Presiding Judge of the New Jersey Court of Errors and Appeals.

131 [Endorsed:] 873. New Jersey Court of Errors and Appeals. Morris Canal and Banking Company and Lehigh Valley Railroad Company, Lessee, (Pros.) Pl'ffs-in-Error, v. David Baird, et als., State Board of Assessors, etc., et al., (Def'ts) Def'ts-in-Error. Order allowing writ of error. Collins & Corbin, Att'ys for Plaintiffs. Filed Dec. 4 1908 S. D. Dickinson Clerk.

132 Know all men by these presents:

That we, Morris Canal and Banking Company, a corporation of the State of New Jersey, and Lehigh Valley Railroad Company, a corporation of the State of Pennsylvana, as principals, and United States Fidelity and Guaranty Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State, in the just and full sum of Five Hundred Dollars ($500.), to be paid to them, their certain attorneys, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our respective corporate seals and dated the Fourth day of December, in the year of our Lord One Thousand Nine Hundred and Eight.

Whereas lately, at the session of the Court of Errors and Appeals of the State of New Jersey, in an action pending in said Court between Morris Canal and Banking Company and Lehigh Valley Railroad Company, plaintiffs-in-Error, and David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State, Defendants-in-Error, a final judgment was rendered affirming the judgment of the Supreme Court of the State of New Jersey against the said Plaintiffs-in-Error; and the said plaintiffs-in-error having obtained from said Court a Writ of Error to reverse the judgment in the aforesaid action, and a citation directed to said David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New

133 Jersey, and J. Willard Morgan, Comptroller of said State, is about to be issued, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington—

Now, the condition of the above obligation is such: That if the said Morris Canal and Banking Company and Lehigh Valley Rail-

road Company shall prosecute their Writ of Error to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

MORRIS CANAL AND BANKING COMPANY,
[SEAL.] By E. B. THOMAS, *President.*

Attest:
D. G. BAIRD, *Secretary.*

LEHIGH VALLEY RAILROAD COMPANY,
[SEAL.] By E. B. THOMAS, *President.*

Attest:
D. G. BAIRD, *Secretary.*

[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN,
Manager.

Attest:
GEORGE E. HAYES, *Att'y in Fact.*

134 STATE OF NEW YORK,
County of New York, ss:

On the 4 day of Dec. 1908, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say that he resided in the City of New York; that he was Manager of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in section 3 of Chapter 720 of the Session Laws of the State of New York for the year 1893. And the said Sylvester J. O'Sullivan further said that he was acquainted with George E. Hayes and knew him to be the Attorney-in-fact of said Company; that the signature of said George E. Hayes, subscribed to the within instrument, is in the genuine handwriting of said George E. Hayes, and was subscribed thereto by like order of said Board of Directors, and in presence of him, the said Sylvester J. O'Sullivan.

DANIEL C. DEASY,
Notary Public, New York County.

At a regular meeting of the Board of Directors of the United States Fidelity and Guaranty Company, duly called and held on the thirteenth day of April, A. D. 1908, at the office of the Company, in the City of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved, That Sylvester J. O'Sullivan, Manager, or George E. Hayes, or Alonzo Gore Oakley, or W. C. Schryver, or Gilman Ashburner, or Louis B. Caziarc, or Henry C. Harlan, or Adolphus A. Jackson, or A. Van Tambacht, Attorneys-in-fact of this Company in the State of New York, be and they hereby are, and each of them is authorized and empowered to execute and deliver and to attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

STATE OF NEW YORK,
County of New York, ss:

I, George E. Hayes, Attorney-in-fact of The United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 4 day of Dec. 1908.

GEORGE E. HAYES,
Attorney-in-fact.

Statement

The United States Fidelity and Guaranty Company,
Home Office, Baltimore, Md.
Capital Paid in Cash $1,700,000. Total Resources over $4,000,000.
At the Close of Business September 30th, 1908.
Commenced Business August 1, 1896.

Assets.

Baltimore City and other Municipal and State Bonds	$1,607,468.58
United States Government Bonds	101,900.00
Railroad and Equipment Bonds	544,390.00
Bank Stocks	79,803.00
Other Stocks	150,000.00
Total Bonds and Stocks	2.483,561.58
H. O. Property, (assessed valuation $406,450.00)	400,000.00
Other Real Estate	84,041.74
Cash in Banks and Home Office	424,219.90
Premiums in course of collection (less commissions)	420,988.80
Loans secured by Collaterals	129,280.61
Loans secured by Mortgages	11,250.00

Due and accrued by U. S. Gov't under construction contracts	18,479.76
Due for Subscriptions, Dep't Guaranteed Attorneys..	40,549.42
Due by Munich Re-insurance Company (net).....	2,658.37
Interest Due and Accrued.....	28,727.93
	$4,043,758.11

Liabilities.

Capital Stock, Paid in Cash.....	$1,700,000.00
Due for Re-insurance and Return Premiums.....	6,354.60
Taxes and Expenses accrued.....	15,000.00
Premium Reserve	1,400,879.61
Reserve for Claims admitted and unadmitted.....	757,461.45
Surplus	164,062.45
	$4,043,758.11

STATE OF NEW YORK,
County of New York, ss:

George E. Hayes, being duly sworn, says: that he is the Attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of September 30, 1908.

GEORGE E. HAYES.

Subscribed and sworn to before me this 4 day of Dec. 1908.
DANIEL C. DEASY,
Notary Public, New York County.

[Endorsed:] Approved Dec. 4, 1908 Mahlon Pitney Presiding Judge Court of Errors & Appeals of New Jersey Filed Dec. 4 1908 S. D. Dickinson Clerk.

135 I, S. D. Dickinson, Secretary of State of the State of New Jersey and ex-officio Clerk of the Court of Errors and Appeals, do hereby certify that the original bond in the case of Morris Canal and Banking Company and Lehigh Valley Railroad Company, Plaintiffs in error, and David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said state, defendants in error, was lodged in this office on the Fourth day of December, Nineteen Hundred and Eight.

In testimony whereof I have hereto set my hand and affixed my official seal at Trenton this fourth day of December, A. D. Nineteen Hundred and Eight.

[SEAL.] S. D. DICKINSON, *Clerk.*

[Endorsed:] Filed Dec. 4, 1908. S. D. Dickinson, Clerk.

136 UNITED STATES OF AMERICA, *ss:*

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

The President of the United States to the Honorable Justices of the Court of Errors and Appeals of the State of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Errors and Appeals of the State of New Jersey, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the action between Morris Canal and Banking Company and Lehigh Valley Railroad Company, (Prosecutors), Plaintiffs-in-Error, and David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State, (Defendants), Defendants-in-Error, wherein there was drawn in question on the hearing of said cause the validity of an Act of the Legislature of the State of New Jersey, entitled: "An Act to revise and amend an act for the taxation of railroad and canal property," approved April 10th, 1884, (which revision and amendment was approved March 27th, 1888), and the several acts amendatory thereof and supplementary thereto, and that the validity of said act was disputed by the Plaintiffs-in-Error on the ground that said act and the supplements thereto and acts amendatory thereof are void, so far as they affect the plaintiffs-in-error and their property, because they impair the obligation of the irrepealable
137 contract of exemption from taxation contained in an Act of the Legislature of the State of New Jersey, entitled: "An Act to incorporate a Company to form an artificial navigation between the Passaic and Delaware Rivers," passed December 31st, 1824, and in an Act entitled: "An Act to authorize the Morris Canal and Banking Company to extend the Morris Canal to the waters of the Hudson," passed January 26th, 1828, and the acts amendatory and supplementary to said act; and that said Act of March 27th, 1888, and the said supplements thereto and amendments thereof are in violation of the Constitution of the United States, and wherein there was also drawn in question in said cause the construction of certain clauses of the Constitution of the United States, and that the plaintiffs-in-error asserted the right, privilege and immunity of exemption from taxation granted to them by the State of New Jersey by the contract contained in the aforementioned Acts of the Legislature of the State of New Jersey passed December 31st, 1824, and January 26th, 1828, and that by the judgment aforesaid the tax levied by the State of New Jersey, and brought up in this cause, was affirmed, although levied in violation of the terms of the aforesaid contract of exemption and immunity, in violation of the provisions of the Constitution of the United States forbidding the passage of any law impairing the obligation of contracts,—manifest error hath happened to the great damage of the Morris Canal and Banking Company and Lehigh Valley Railroad Company, Plaintiffs-in-Error, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and complete justice

done to the parties aforesaid in this behalf, do command you
138 if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the thirty first day of December inst., in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the fourth day of December, 1908.

[Seal erased in copy.]

H. D. OLIPHANT,
Clerk of the Circuit Court of the United States
for the District of New Jersey.

139 [Endorsed:] 873. United States Supreme Court. Morris Canal and Banking Company and Lehigh Valley Railroad Company, Lessee, Pl'ffs-in-Error, v. David Baird, et al., State Board of Assessors, etc., et al., Def'ts-in-Error. Writ of error. Returnable Dec. 31, 1908. Gilbert Collins, Attorney. Allowed by Mahlon Pitney, Presiding Judge of the New Jersey Court of Errors and Appeals. Filed Dec. 4, 1908. S. D. Dickinson, Clerk.

140 STATE OF NEW JERSEY,
Department of State:

I, S. D. Dickinson, Secretary of State of the State of New Jersey, and ex officio Clerk of the Court of Errors and Appeals, do hereby certify, that the original Writ of Error in the case of Morris Canal and Banking Company and Lehigh Valley Railroad Company, Plaintiffs-in-Error, against David Baird, Stephen J. Meeker, Theodore Strong and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State, Defendants-in-Error, was lodged in this office on the fourth day of December, A. D. 1908, together with copies thereof for the said Defendants-in-Error.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Trenton, this fourth day of December, A. D. 1908.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON, *Clerk.*

[Endorsed:] Filed Dec. 4, 1908. S. D. Dickinson, Clerk.

141 In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

Witness my hand and the seal of the Court of Errors and Appeals, this fifteenth day of December, A. D. 1908.

[Seal of the Secretary of the State of New Jersey.]

S. D. DICKINSON, *Clerk.*

[Endorsed:] Filed Dec. 4, 1908. S. D. Dickinson, Clerk.

142 UNITED STATES OF AMERICA, *ss:*

[Seal of the Secretary of the State of New Jersey.]

The President of the United States to David Baird, Stephen J. Meeker, Theodore Strong, and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of said State, Greeting:

You are hereby cited and admonished, to be and appear at a Supreme Court of the United States, at Washington, on the thirty-first day of December, A. D. 1908, pursuant to a Writ of Error filed in the Clerk's Office of the Court of Errors and Appeals of the State of New Jersey, wherein Morris Canal and Banking Company and Lehigh Valley Railroad Company are Plaintiffs-in-Error, and you are Defendants-in-Error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America, this Fourth day of December, A. D. 1908.

MAHLON PITNEY,
Presiding Judge of the New Jersey Court of Errors and Appeals.

Attest:
S. D. DICKINSON, *Clerk.*

143 [Endorsed:] United States Supreme Court. Morris Canal and Banking Company, et al., Plaintiffs in Error, vs. David Baird, et als., Defendants in Error. Citation. Gilbert Collins, Att'y of Plaintiffs in Error. Service of this citation and receipt of a copy thereof for each defendant in error is hereby acknowledged this eighth day of December, A. D. 1908. Edmund Wilson, Att'y General, Att'y of Defendants in Error. Filed Dec. 10, 1908. S. D. Dickinson, Clerk.

Endorsed on cover: File No. 21,462. New Jersey Court of Errors and Appeals. Term No. 124. Morris Canal & Banking Company and Lehigh Valley Railroad Company, plaintiffs in error, vs. David Baird, Stephen J. Meeker, Theodore Strong, and Eckard P. Budd, State board of assessors of the State of New Jersey, and J. Willard Morgan, comptroller of said State. Filed December 30th, 1908. File No. 21,462.

FILED

APR 20 1911

JAMES H. McKENNEY

Supreme Court of the United States.

October Term, 1914. No. 1

MORRIS CANAL AND BANKING COMPANY AND LEHIGH VALLEY RAILROAD COMPANY,

Plaintiffs in Error,

In Error to New Jersey Court of Errors and Appeals.

v.

DAVID HAINS, *et al.*, State Board of Assessors of the State of New Jersey,

Defendants in Error.

Brief for Defendants in Error.

EDMUND WILSON,

Attorney General of New Jersey,

and

ROBERT H. McCARTER,

For Defendants in Error.

The Baker Printing Co., Law Case Printers, 321 Market St., Newark, N. J.

Supreme Court of the United States.

October Term, 1910. No. 124.

MORRIS CANAL AND BANKING COMPANY AND LEHIGH VALLEY RAILROAD COMPANY, *Plaintiffs in Error,* *vs.* DAVID BAIRD, *et al.*, constituting State Board of Assessors of New Jersey, and J. Willard Morgan, Comptroller of said State, *Defendants in Error.*	*In Error to the Court of Errors and Appeals of the State of New Jersey.*

Brief for Defendants in Error.

STATEMENT.

This writ of error seeks to review a judgment of the Court of Errors and Appeals of the State of New Jersey sustaining a tax upon certain canal property in the State of New Jersey, in the possession of the Lehigh Valley Railroad Company under a lease hereinafter referred to. The particular tax under attack was that imposed by the taxing body, the State Board

of Assessors, for the year 1906, pursuant to the provisions of a scheme of state taxation of railroad and canal property originally authorized in New Jersey by an act of the Legislature approved April 10th, 1884 (P. L. 1884, p. 142), and revised and amended in 1888 (P. L. 1888 p. 269). There is no dispute but that the plaintiff in error has annually paid the tax thus imposed, without further contest or objection than the simple filing of a protest such as is found on page 56 of the record down to the commencement of this suit. In other words, the Lehigh Valley Railroad Company while always claiming that this canal property in its possession was exempt from taxation, has nevertheless failed, until it commenced this suit, to contest the same or risk a decision thereon, satisfying itself with the filing of an annual protest. This conduct for a period of twenty-two years would seem, under the case of *Given* v. *Wright,* 117 U. S. 648, to amount to such acquiescence in the view that the claimed exemption did not exist, as to be tantamount to an abandonment of the claimed exemption.

The taxing body, the Supreme Court of New Jersey, and the New Jersey Court of Errors and Appeals, having all united in the view that the claim of the Lehigh Valley Railroad Company that this property was exempt from taxation was unfounded, this court is appealed to upon the grounds that the taxation, and the legislation upon which it is founded, are illegal as infringing a prior contract of exemption from taxation contained in the charter of the Morris Canal and Banking Company, the lessor of the real estate and former owner of the personal property, thus taxed.

The Morris Canal and Banking Company was incorporated by an act entitled "An act to incorporate a company to form an artificial navigation between the Passaic and Delaware rivers," passed December 21st, 1824. (P. L. 1824, p. 158, Case, p. 27.)

The exemption from taxation is found in the fourth section of the act as follows:

> "*IV. Exemption from Taxation.* No state, county, township or other public assessments, taxes or charges whatsoever shall at any time be laid or imposed upon the said Canal Company, or upon the stocks and estates which may become vested in them under this act, but this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation under this act according to the true intent and meaning thereof; and no tax shall be imposed upon any property of said company, or of other persons transported or used upon or about said canal of greater amount according to the value of the article taxed than shall at the same time be imposed upon the property of the same or similar kinds in the State of New Jersey."

Authority was given to extend the canal to the Hudson river by an act entitled "An act to authorize the Morris Canal and Banking Company to extend the Morris Canal to the waters of the Hudson," passed January 26, 1828 (P. L. 1828, p. 34, Case, p. 32), and for that purpose it was enacted that said company should have all the rights, powers and privileges given and granted by the original act of incorporation, and

should be subject to all the restrictions, limitations, conditions and provisions in the said act contained in the same manner and to the same effect as though the said company had been originally authorized by said act to construct a canal or artificial navigation to connect the waters of the Delaware river, near Easton, with the waters of the Hudson, at or near the city of Jersey.

By the second section of an amendment to the charter, passed January 28, 1830 (P. L. 1830, p. 17, Case, p. 35), the Morris Canal and Banking Company was authorized from time to time to borrow, and for securing its payment with the interest thereon to pledge or hypothecate, by way of mortgage, trust or otherwise, the Morris canal, with all its privileges, appendages and appurtenances, and all the property and chartered rights of the company, and in the event of default the person or persons, body corporate, or their legal representatives or assigns, claiming under such pledge, hypothecation, mortgage or trust might by due process of law acquire and have and hold, use and enjoy the said canal, with its appendages and appurtenances, and the property of the said company, and take and receive the tolls, rents, issues and profits thereof during the whole residue of the term for which the company was chartered or incorporated, in as full and ample a manner as the stockholders of the said company could or might have had, used or enjoyed the same, subject, nevertheless, to all the restrictions, limitations and conditions contained in the charter of the company.

Pursuant to the authority conferred by this supplement to the charter, a mortgage was made by the

Morris Canal and Banking Company on the 29th day of March, 1830, to Wilhelm Willink, Jr., upon the canal, and also upon the chartered rights of the company to secure the payment of $750,000. (Case, p. 59.) The company having neglected to pay the interest upon this mortgage, Willink, on the 20th day of October, 1841, filed his bill in the Court of Chancery to foreclose the mortgage, and such proceedings were had that a master of the court, after proper advertisement, sold by virtue of decree and execution, at public vendue, at Chandler's hotel, in the East ward of the city of Newark, called the Park House, on Monday, October 31st, 1844, the mortgaged premises to Benjamin Williamson, Asa Whitehead and John J. Bryant, the highest bidders therefor, for the sum of one million dollars. By deed bearing date October 21st, 1844, the Master, Ira C. Whitehead conveyed the premises so mortgaged and sold to the said Benjamin Williamson, Asa Whitehead and John J. Bryant, their heirs and assigns. To have and to hold the same unto them, their heirs and assigns, to the only proper use and benefit and behoof of them, their heirs and assigns, forever, in as full, ample and beneficial manner as by virtue of the said writ of *fieri facias* the said master might, could or ought to convey the same.

After this sale, a reorganization was effected, and the property continued to be operated under the corporate title of the Morris Canal and Banking Company, and the continued existence of the charter was repeatedly acknowledged by the Legislature in the passage of supplements to the charter or acts affecting the company from 1845 to 1879.

The courts of New Jersey have also repeatedly recognized the continued existence of the Morris Canal and Banking Company as a corporation since the sale in 1844, and no suggestion seems to have been made at any time that such sale had any effect on or interrupted in any way the corporate life, franchises, rights or privileges of the Morris Canal and Banking Company under its original charter.

By a supplement to the charter, approved March 14, 1871 (P. L. 1871, p. 444, Case, p. 42), it was enacted as follows:

> "Sec. 1. It shall and may be lawful for the Morris Canal and Banking Company, by and with the consent of a majority in interest of the stockholders of said company, expressed in writing and duly authenticated by affidavit and filed in the office of the Secretary of State, to lease the canal of said company or any part thereof, with all or any of its boats, property, works, *appurtenances or franchises,* to any person or persons or corporation, either perpetually or for such shorter time and upon such terms and agreements as may be agreed upon between the said contracting parties, and it shall be lawful for the lessee or lessees in said lease to use and enjoy the said property and franchises so demised for the term in said lease mentioned."

Subsequent sections provided for remedy to stockholders dissatisfied with the terms of the lease and for the filing of the consent of stockholders, &c.

Under the authority given by this act of 1871 an indenture or lease was executed and delivered between the Morris Canal and Banking Company of the first

part, and the Lehigh Valley Railroad Company, a corporation created by and existing under the laws of the State of Pennsylvania, of the second part, bearing date the 4th day of May, 1871, by which the party of the first part, let and demised unto the party of the second part, its successors and assigns, "the entire canal and navigation works of the party of the first part as the same are now located and constructed from the river Delaware in Phillipsburg, in the County of Warren, in the State of New Jersey, to the river Hudson, at Jersey City, in the County of Hudson, in the same state, or as the same may hereafter be constructed in pursuance of any and every lawful authority now existing or which may hereafter exist, with all the franchises and extensions thereof, made and to be made, also all the lands, water rights, privileges and easements, dams, basins, pools, reservoirs, feeders, locks, gates, machinery, fixtures, railroads, tracks, wharves, docks, piers, landings, water rents, ground rents, lands, tenements and hereditaments, with the appurtenances, reversions, remainders, rents, issues and profits thereof, now belonging or in any wise appertaining to the party of the first part, or which for any purpose incident to or connected with the business which the party of the second part, its successors or assigns, may, as lessee of the party of the first part, lawfully carry on may hereafter be acquired by the party of the first part, *and also all the corporate franchises, rights and privileges,* other than that of being a corporation, now held or hereafter to be acquired, of the party of the first part; to have and to hold the premises thus leased and demised as aforesaid, or intended so to be, unto

the said party of the second part, its successors and assigns perpetually hereafter," and by which the party of the first part granted, bargained and sold, assigned, transferred and set over unto the party of the second part, "all cars, trucks, boats, docks, scows, dredging machines, tools, implements, appurtenances, furniture, mules, horses, cattle, harness, supplies, stores and movable property of every kind and description, and also all the right, title, interest, claim, property and demand whatsoever of the party of the first part in and to all leases, bills of sale or contracts relating to boats or vessels heretofore leased, hired or sold by it, all bonds, stocks, claims, demands, beneficial interests, contracts, choses in action, improvements, plans, surveys and generally all personal property whatever of every kind and description whether hereinbefore specially referred to or not, to which the party of the first part is now in any manner or way entitled, excepting only the furniture of the principal office of the party of the first part at Jersey City, its corporate seal and its business books, papers and records; to have and to hold the same unto the said party of the second part, its successors and assigns, to and for its and their only proper use and benefit forever."

The lease is a long one containing many provisions defining the relations and obligations of the parties thereto. (Case, page 44.)

Paragraph seven reads as follows:

> "*Seventh.* That the party of the second part shall punctually and faithfully pay all taxes, charges and assessments of any and every kind which shall hereafter be lawfully assessed or

imposed upon the premises hereby demised or any part thereof, or on the business or any of the business done thereon or therewith, or on the receipts, gross or net, of the said business, or on the present capital stock of the party of the first part, or any corporate right, franchise or privilege of the party of the first part hereinbefore granted and demised to the party of the second part; but nothing herein contained shall be construed as rendering the party of the second part liable for any tax, charge or assessment which may be assessed or become in any way chargeable on the sums hereinbefore agreed to be paid by the party of the second part to the party of the first part, its creditors or stockholders, or for any tax, charge or assessment chargeable against or collectible from the said party of the first part, its creditors or stockholders, for or on account of the payment to or receipt by them of the said sums or any part thereof."

By the eighth clause, the party of the second part agreed to perform and keep the obligation of the party of the first part to pay the State of New Jersey the sum of twenty-five thousand dollars yearly, and all other conditions and obligations imposed upon or assumed by the party of the first part under the Jersey City Basin Act of March 14, 1867 (P. L. 1867, p. 251; Case, p. 41), which basin, it may be noted in passing, was expressly excluded from the exemption from taxation contained in the original charter of the canal company.

(See *State, Morris Canal and Banking Company, Prosecutor,* v. *Haight,* 6 Vr., 178, *S. C. on Error,* 7 Vr., 471.)

The tenth paragraph reads as follows:

"*Tenth.* That the party of the second part shall and may avail itself of *every franchise right and privilege* in regard to the use, maintenance, extension, improvement or alteration of the canal, navigation works and other property herein demised, conferred and granted it under present or future law; the party of the first part hereby agreeing that nothing in this indenture contained shall restrict or impair the right of the party of the second part to do or omit anything in the premises which it might otherwise lawfully do or omit."

The eleventh paragraph reads as follows:

"*Eleventh.* That the party of the first part shall and will maintain its corporate existence and organization, and shall and will from time to time, and at all times when requested by the party of the second part, its successors or assigns, put in force and exercise each and every corporate power and do each and every corporate act which the party of the first part might now or may at any time hereafter lawfully put in force and exercise, to enable the party of the second part, its successors or assigns, to enjoy and exercise *every right, franchise and privilege* which may lawfully be enjoyed or exercised in respect to the use, maintenance, management, renewal, extension, alteration or improvement of the premises hereby demised or intended so to be, or the business thereon or therewith to be carried on; the party of the second part hereby agreeing to pay to the said party of the first part an annual sum of fifteen hundred dollars ($1,500.00) in lawful money of the United States of America in equal semi-annual payments, for the purpose of defraying the expenses

of maintaining the corporate organization of the party of the first part, the first payment to be made on the first day of September next, and semi-annually thereafter, and the party of the second part further agreeing to indemnify and save harmless the party of the first part against all expenses, loss, damage or liability resulting from or occasioned by any exercise of corporate powers or performance of corporate acts by the party of the first part, when exercised or performed at the request of the party of the second part."

By the fifteenth paragraph, it is agreed that it shall be lawful for the said party of the second part to use the name of the party of the first part in all suits or actions and in all proceedings, whether at law, in equity or otherwise, instituted or taken by the party of the second part to assert, maintain or define the *estate, franchise, rights, liberties and privileges* demised or intended so to be whenever the party of the second part shall be advised by counsel that the use of the said name will be either necessary or convenient for the purposes in view, and the president of the party of the second part is thereby constituted and appointed the true and lawful attorney of the party of the first part, for it and in its name, but for the use and benefit of the party of the second part, to do and perform whatever act, and to sign, seal and deliver whatever bid, instrument or assurance may be required and fully perform and carry out covenants and agreements in the lease contained on the part of the party of the first part to be performed and carried out, according to their true intent and meaning.

The concluding paragraphs of the lease contain provisions bearing on the refusal or neglect of the party of the second part to keep the covenants of the lease, and the consequent resumption of possession of the demised premises by the party of the first part,

The estate enjoyed by the Canal Company in lands acquired by authority of the charter, whether by grant or condemnation or prescription, was of the whole present interest and was, notwithstanding the right of the State to take at the end of one hundred and fifty years, equivalent while it lasted to an estate in fee simple.

Barnett v. *Johnson*, 2 McC., 481 (1883).
State v. *Brown*, 3 Dutch., 13 (1858).
Pipe Line Co. v. *D., L. & W. R. R. Co.*, 33 Vr., 254 (1898).
Currie v. *N. Y. Transit Co. & Nat'l Docks Rwy. Co.*, 21 Dick., 313 (1903).

And the property of the Canal Company would have been taxable if the Legislature had not exempted it.

Bridge, Proprietors, ads. *State,* 1 Zab., 384. *Affirmed* 2 Zab., 593.

This was in effect held as to the grant of the 1867 basin to the Canal Company, although such basin was always subject to be taken over by the State at the end of the period of one hundred and fifty years from the date of the charter. *State, Morris Canal and Banking Company, Pros.* v. *Haight,* 7 Vr., 471.

Under binding authorities, both State and Federal, this charter immunity from taxation, found in the act of incorporation of the Morris Canal and Banking

Company, constituted an irrepealable contract between the State and the corporation.

State Board of Assessors v. *Morris & Essex Railroad Co.*, 20 Vr., 193.

Singer Manufacturing Co. v. *Heppenheimer*, 29 Vr., 633.

Hancock, Comptroller, v. *Singer Manufacturing Co.*, 33 Vr., 289.

Cooper Hospital v. *Camden*, 39 Vr., 691.

But, while the existence of this contract must be recognized, it is a well-settled rule that immunity from taxation granted to a corporation is a personal privilege incapable of being transferred to another corporation without express legislative sanction. It is a privilege of a personal character entirely distinct from the franchise of the corporation, and will not pass by a transfer under legislative authority empowering the corporation to assign and transfer its franchises and property.

"Courts are astute," says Mr. Justice Brown, of this Court, in a recent case involving the effect of corporate changes on charter contracts for immunity from taxation, "to seize upon evidence tending to show *either that such* exemption (from taxation) were not *originally intended*, or that they have become inoperative by changes in the original constitution of the companies." *Yazoo, &c., R. Co.* v. *Adams*, 180 U. S. 22.

And the N. J. Court of Errors and Appeals, in the recent case of *Sisters of Charity of St. Elizabeth* v. *Corey*, 44 Vr., 699, has said:

"The true rule upon this subject is accurately stated in the *Amer. & Eng. Encyc.* (2d Ed.), Vol.

12, p. 302, as follows: 'A grant of exemption from taxation being in the nature of a renunciation of sovereignty (or, as some jurists have expressed it, being in derogation of the sovereign authority and of common right), must invariably be construed most strictly against the grantee, and can never be permitted to extend either in scope or duration beyond what the terms of the concession clearly require.' It has been declared and applied, not only by the United States Supreme Court, but by the courts of almost every State in the Union, as will appear by a reference to the foot note in the American & English Encyclopedia of Law, which contains a citation of the decisions. We ourselves had declared this to be the true rule of construction prior to the promulgation of the decisions in the Chatam case. *Nevin* v. *Krollman*, 38 N. J. Law, 574; *State Board* v. *Morris & Essex R. R. Co.*, 49 N. J. Law, 199; *State Board* v. *Paterson, etc., R. R. Co.*, 50 N. J. Law, 450."

The Act of 1830 (Case, p. 35), by which the Willinck mortgage was authorized, gave permission to include in the mortgage the *"chartered rights"* of the company, and the sale under the foreclosure covered such *"chartered rights"* and the Master's deed conveyed such *"chartered rights."* This expression would not at the present time, under the recognized rules of construction laid down for our guidance by the Supreme Court of the United States and by the New Jersey Court of Errors, later specifically referred to, *include immunity from taxation.* We, therefore, submit that the charter immunity from taxation of the Morris Canal and Banking Company was extinguished by the foreclosure sale in 1844, and that the property of the

Morris Canal and Banking Company, as thereafter constituted, was subject to taxation as fully as though such exemption had never existed.

But if this Court should determine that the immunity from taxation was not extinguished by the foreclosure sale in 1844, and that at the time of the lease to the Lehigh Valley Railroad Company, in 1871, it was in full force and effect, *it is clear that the property of the Canal Company is now taxable, notwithstanding such exemption.*

In 1871 the canal property was leased to the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania.

No such lease could then have been made without legislative authority, and the enabling act is the supplement to the canal company's charter, approved March 14, 1871 (P. L. 1871, 444; case, p. 42).

> *Stewart* v. *Lehigh Valley Railroad Co.*, 9 Vr., 505-513 (with reference to this very lease).

The first section contains all to be found in this act by way of legislative authority to make a lease. The right conferred on the Morris Canal and Banking Company was, with the consent of a majority in interest of its stockholders, expressed in writing, duly authenticated by affidavit, and filed in the office of the Secretary of State, "to lease the canal of said company, or any part thereof, with all or any of its boats, property works, appurtenances *and franchises*, to any person or persons or corporation, either perpetually or for such shorter time and upon such rents and agreements as may be agreed upon between the said contracting parties, and it shall be lawful for the

lessee or lessees in said lease to use and enjoy the said *property and franchises* so demised for the term in said lease mentioned."

In *State Board of Assessors* v. *Morris and Essex Railroad Co.*, 20 Vr., 193, Mr. Justice Depue, speaking for the New Jersey Court of Errors and Appeals, discusses at length, pages 199 *et seq.*, the principles of law and statutory construction applicable to exemptions from taxation in corporation charters.

The fundamental rule as to an exemption from taxation, as laid down in that case, was as follows: "It is a privilege of a personal character entirely distinct from the franchises of a corporation, and will not pass by a transfer under legislative authority empowering the corporation to assign and transfer its *franchises and property.*"

The learned justice, on page 199 of the opinion, quoted approvingly the following language of Mr. Justice Field, in *Morgan* v. *Louisiana*, 93 U. S., 217.

> "The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation and without which its road and works would be of little value—such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former, *i. e.*, the franchises, may be conveyed to a purchaser of the road as part of the property of the company; the latter, *i. e.*, immunity from taxation, is personal and incapable of being transferred without express statutory direction."

And also the language of Mr. Justice Matthews, in *Memphis Railroad Co.* v. *Commissioners*, 112 U. S., 609, 617:

> "The exemption from taxation must be construed to have been the *personal* privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a *successor*. This salutary rule of interpretation is founded upon an obvious public policy which regards such exemption as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirement of the grant construed *strictissimi juris*."

Since these decisions by the Supreme Court of the United States it has been authoritatively settled that the legislative intent to pass an exemption from taxation to a lessee or grantee cannot be inferred from the use in the enabling act of the word "privilege," and that unless the authorized grant includes "immunity" or "immunities," *no right* to pass the exemption results.

Phoenix Insurance Co. v. *Tennessee*, 161 U. S., 174, contains a discussion of all the previous cases in the Supreme Court of the United States, and concludes that the exemption under discussion in that case did not pass specifically because of the absence of the word "immunity" in the last act of legislation, saying: "The later cases of *Pickard* v. *Tennessee, &c., Railroad*, 130 U. S., 637, and *Wilmington, &c., Railroad* v. *Alsbrook*, 146 U. S., 279, show that there must

be other language than the mere word 'privilege,' or other provisions in the statute removing all doubt as to the intention of the Legislature before the exemption will be admitted."

A careful reading of the opinion in this case, which is the last word of the highest court in the land upon the subject, will show that the absence of the word "immunity" in the enabling legislation is fatal to any claim that an immunity from taxation possessed by a lessor, assignor, or grantor company passes to a lessee, assignee or grantee.

The opinion of Mr. Justice Field, in *Pickard* v. *East Tennessee, &c., R. R. Co.*, 130 U. S., at p. 637, may perhaps, be properly quoted.

> "It is," he says, "true that there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and, we think, the better opinion is that unless other provisions remove all doubt of the intention of the Legislature to include the immunity in the term 'privileges,' it will not be so construed. It can have its full force by confining it to other grants of the corporation."

See also *Chesapeake and Ohio R. R. Co.*, v. *Miller*, 114 U. S., 176; *Wilmington, &c., Railroad* v. *Alsbrook*, 146 U. S., 279.

The case of *Tennessee* v. *Whitworth*, 117 U. S., 139, if contrary to the foregoing, is distinguished in *Phoenix Insurance Co.* v. *Tennessee, supra*, at page 182.

The legislative authority to lease conferred on the Morris Canal and Banking Company by the supplement to its character, approved March 14, 1871, above quoted, extended only to the "boats, property, works, appurtenances, *and franchises*," and the lessee was to use and enjoy "*the said property and franchises so demised.*" Nothing in this enabling act conferred any right to transfer to a lessee *the immunity from taxation* enjoyed by the Morris Canal and Banking Company under its personal contract with the State.

It is true that the indenture of lease executed and delivered by the Morris Canal and Banking Company to the Lehigh Valley Railroad Company, bearing date the fourth day of March, 1871, made under the authority of this act, contains in describing the demised property, the words, "*and also all the corporate franchises, rights and privileges* other than that of being a corporation, now held or hereafter to be acquired by the party of the first part," but the words "rights and privileges" have been introduced in the lease by the parties to that instrument without any legislative sanction therefor; and as above suggested and in another part of this brief more fully demonstrated, the United States Supreme Court has subsequently more clearly defined the doctrine relied upon by Judge Depue, in the *Morris & Essex case*, so as to make even those words insufficient without the use of the further word "immunity."

Such *immunity from taxation* is incapable of transfer without express statutory direction, and will not pass by transfer under a legislative authority empowering a corporation to assign and transfer its *franchises and property*. The provision contained in the

Tenth Clause of the lease, that the lessee shall and may avail itself of *"every franchise right and privilege* in regard to the use, maintenance, extension, improvement or alteration of the canal, navigation works and other property herein demised, conferred and granted by any present or future law," is likewise broader than the legislative authority; so also the provision in the Eeventh Clause of the lease binding the lessor to preserve its corporate existence and organization and to put in force and exercise each and every corporate power and do each and every corporate act which the lessor might then or at any time thereafter lawfully put in force and exercise, to enable the lessee, its successors and assigns to enjoy and exercise every *"right, franchise and privilege* which may lawfully be enjoyed or exercised in respect to the use, maintenance, management, renewal, extension, alteration or improvement of the premises hereby demised or intended so to be, or the business thereon or therewith to be carried on." No general law authorizing such a lease as this by a canal corporation was on the statute books at the time this lease was made, and no enabling act for the benefit either of the lessor or the lessee company was passed by the Legislature other than the act of March 14, 1871, above referred to.

The capacity of the Lehigh Valley Railroad Company, a Pennsylvania corporation, to take as lessee under this act, has been recognized by the Court of Errors in *Stewart* v. *Lehigh Valley Railroad Company, supra,* 9 Vr., 505.

The effect of this lease in perpetuity is a conveyance in fee.

It was so held by the Court of Errors and Appeals f a lease for 999 years in *Black* v. *Delaware and Raritan Canal Co.*, 9 C. E. G., 456, 465.

By the lease the title to the property described there- n so far as its transfer was authorized by the enabling tatute, became vested in the lessee company.

Pipe Line Co. v. *D., L. & W. R. R. Co.*, 33 Vr., 254, 261.

Property under perpetual lease is to be regarded, or purposes of taxation at least, as the property of he lessee.

Ocean Grove Camp Meeting Association v. *Reeves* (N. J. Sup. Ct.) 75 Atl. Rep. 783. (Affirmed in N. J. Ct. of E. and A.)

Huck v. *Chicago & Alton Rwy. Co.*, 86 Ill., 352.

Commonwealth v. *Nashville, &c., R. Co.*, 93 Ky. 430. S. C., 20 S. W. Rep., 383.

Appeals Tax Court v. *West Md. R. Co.*, 50 Md., 274.

The lease of May 4th, 1871, must therefore, be mited, whatever its language, by the legislative uthority under which it was made, and as such legis- ative authority is extended only to *property and ranchises*, no use by the parties themselves of the ad- itional words "*rights and privileges*" can broaden the rant so as to include the *immunity from taxation* njoyed by the lessor company, even if those words e conceded to include this immunity.

Said Mr. Justice Dixon, speaking for the New Jersey Court of Errors and Appeals concerning this very lease, in *Stewart* v. *L. V. R. R. Co.*, *supra:*

> "It is not open to dispute that such a lease as this can be valid only if sanctioned by the Legislature, nor is such sanction to be implied. It must rest upon a clear expression of legislative intention. * * * The court has no right to add to the words of the Legislature, or to substitute other words for them, nor to widen the power conferred; nor has it more right to strike out words, or detract from their fair and ordinary meaning for the purposes of restricting the grant."

The inclusion in the leased property of "rights and privileges" not authorized by the enabling statute did not invalidate the lease. It was good so far as authorized.

Hendee v. *Pinkerton*, 14 Allen, 381.
Gloninger v. *Pittsburgh & C. R. R. Co.*, 21 Atl. Rep., 211 (Pa.).
Butler v. *Rahen*, 46 Md., 541.

It should also be noted that the lease of May 4th, 1871, is a lease only of the canal and navigation works, but that as to the boats and other movable tangible personal property, bonds, stocks, claims, contracts and choses in action the contract is not one of lease, *but of sale*, and that under the provisions of the lease the title to all the personal property of the corporation passes to the lessee, "to have and to hold the same unto the said party of the second part, its successors and assigns, to and for its and their only proper use and behoof forever."

The Morris Canal and Banking Company, therefore, is left without personal property, and the Lehigh Valley Railroad Company is assessable as to all such personal property as owner, and not as lessee, and as the immunity from taxation extended, in any event, only to property of the company "*possessed, occupied* and *used by the company*" for the actual and necessary purposes of canal navigation under the act, the minute the Canal Company ceased to have any interest in said property, reversionary or otherwise, that minute any possible claim of immunity of that property from taxation ceased.

It would also seem, from the seventh paragraph of the lease that the parties to this instrument expected that after the lease the canal property would be subject to taxation, as that paragraph provides that the lessee "shall punctually and faithfully pay all taxes, charges and assessments of any and every kind which shall hereafter be lawfully assessed or imposed upon the premises hereby demised, or any part thereof, or on the business, or any of the business done thereon or therewith, or on the receipts, gross or net, of the said business, or on the present capital stock of the party of the first part, or on any corporate right, franchise or privilege of the party of the first part hereinbefore granted and demised to the party of the second part." While it is true that the Canal Company had some property not included in the terms of the exemption, which was expressly limited to estate or property of the company, possessed, occupied and used by the company for the actual and necessary purposes of canal navigation, under the act, according to the true intent and meaning thereof, such prop-

erty outside the exemption was, however, limited in extent and readily definable without the use of the language employed in paragraph 7 of the lease. No one can read this paragraph without realizing that the draughtsman of the lease contemplated that the lessee would thereby become liable to pay taxes on the demised property. While the language thus employed by the draughtsman would not be conclusive on the rights of the parties, it is none the less significant and not to be ignored, especially when it is remembersd that just at the time this lease was executed the subject of tax exemptions under irrepealable contracts was under legislative discussion, and in frequent litigation under many different charters.

The stress of the argument of the plaintiffs in error is directed to the case, in this court, of *State of New Jersey* v. *Wilson*, 7 Cranch., 164, and emphasis is made upon the provisions in the charter of the Morris Canal and Banking Company providing that the canal after being constructed, shall be a public highway, and also for the reversion of the property to the State of New Jersey at the end of one hundred and forty-nine years after its incorporation; and the argument is made that these facts constitute a consideration for the exemption from taxation differentiating the situation from most of the authorities above quoted and likening it to the case of *New Jersey* v. *Wilson*, *supra*. It is submitted that in many, if not all of the authorities herein cited, there was an express consideration for the exemption from taxation granted by the Legislature at the same time of its chartering the company. The mere fact that the

Canal Company's charter as construed by the New Jersey Courts, made the canal when built a public highway, is not novel. This court has time and again held that railroad companies though chartered to be built and owned by a private corporation are public highways, and none the less so, because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such corporations being created for public purposes, perform the functions of the State and are given the right of eminent domain. They are, therefore public highways.

Alcott v. *Supervisors*, 6 Wall., 678.
Smyth v. *Ames*, 169 U. S., 466, 544.

An examination of sections VIII and XXV of the charter (Case, pp. 29, 31) shows that the tolls to be charged for the use of the canal were not, as claimed by counsel for the plaintiff in error, fixed by the State, but that authority to fix them was directly bestowed upon the directors, who were also authorized to change them, and the State was given an ultimate power to appoint commissioners to act in conjunction with commissioners to be appointed by the Board, in fixing rates, evidently when the directors settled upon exorbitant rates. This charter given in 1824 antedated by twenty years the constitution of New Jersey of 1844, in which, for the first time, appeared the prohibition against the taking of private property for public use without first making compensation, and the highest courts in New Jersey have frequently held that this company therefore possessed the extraordinary power not only of acquiring but of occupy-

ing and using land, water and rights for its purposes without first paying therefor, the land owner being left to the sole remedy of an action on the case to recover such compensation (*Morris Canal at the Suit of Seward*, 3 Zab., 220; *Lehigh Valley Railroad Company* v. *McFarland*, 4 Stew. Eq., 706). While, therefore, the State of New Jersey in chartering this Company required a surrender of its property after a century and a half of its existence, it gave to the projectors many great advantages, including as shown by the brief of plaintiff in error, banking powers in order to encourage them in undertaking the enterprise.

In calling the court's attention to these matters we in no wise desire to escape from the full effect of the contention that the exemption was as between the State and the Canal Company, a contractual right based on sufficient consideration to render the legislature incapable of violating it so long as the exemption maintains its life. In other words our claim is not that the exemption had no sufficient consideration to support it, but that it has lost its vitality by reason of the lease in 1871 of the property to the Lehigh Valley Railroad Company. It must not be overlooked that the assessment is imposed upon the Lehigh Valley Railroad Company as lessee and not upon the Morris Canal and Banking Company (Case, pp. 7, 8, 9, 10, 11 and 12). The Morris Canal and Banking Company is not a party to the assessment, and only appears in this litigation by its intervention as a co-prosecutor with the Lehigh Valley Railroad Company to the writ of *certiorari* to set aside the tax.

The brief of the plaintiff in error plants itself firmly upon the case of *New Jersey* v. *Wilson, supra.* It contains no reference, however, to later authorities in this court commenting upon that case. For example, in *Given* v. *Wright,* 117 U. S., 648, the attention of this court was directed by the then Attorney General of New Jersey to the fact that *New Jersey* v. *Wilson* had been decided without argument and upon an incomplete statement of facts, and this court while feeling itself bound by the decision took pains through Mr. Justice Bradley to say:

> "We do not feel disposed to question the decision in *New Jersey* v. *Wilson.* It has been referred to and relied on in so many cases from the day of its rendition down to the present time, that it would cause a shock to our constitutional jurisprudence to disturb it now. If the question were a new one entitled to a great deal of weight, especially since the emphatic declarations made by this court in *Providence Bank* v. *Billings,* 4 Pet., 514, and other cases, as to the necessity of having the clearest legislative expression in order to impair the taxing power of the State. See the cases collected in *Vicksburg, &c., Railroad Co.* v. *Dennis,* 116 U. S., 665, 668."

This later decision was likewise commented upon by Mr. Justice Peckham in the recent case of *Jetton* v. *University of the South,* 208 U. S., 503.

While attributing, therefore, full credit to *New Jersey* v. *Wilson,* we feel justified in asserting that this court will go no further than to follow exactly what was determined in the case, and it is this that really makes the case utterly inapplicable to the case

at bar. As stated by Mr. Justice Peckham in *Jetton* v. *University of the South*, 208 U. S., 503. "In *New Jersey* v. *Wilson*, the exemption was assumed to be absolute, unconditional and unlimited in time." In the *Jetton* case the exemption by the charter was expressly stated to exist only so long as the property belonged to the educational institution exempted, and this court, referring to the limited character of the exemption and differentiating the case in that particular from *New Jersey* v. *Wilson*, said:

> "In the case before us the exemption lasts only so long as the university owns the lands, and when it conveys a certain interest in them to a third person, it no longer owns that interest, which at once becomes subject to the right of the State to tax it."

So this court through Mr. Justice Field in *Morgan* v. *Louisiana*, 93 U. S., 217, 223, in commenting upon *New Jersey* v. *Wilson*, said:

> "In *New Jersey* v. *Wilson*, 7 Cranch., 164, the land purchased by the State from the Indians was by the statute exempted from subsequent taxation without reference to its ownership. The privilege, said the court, though for the benefit of the Indians, was annexed by the terms which created it to the land itself and not to the persons."

It therefore becomes very important that the exact language of the exemption under consideration be observed. It reads:

> "No state * * * taxes or charges whatsoever shall at any time be laid or imposed upon the said canal company, or upon the stocks and estate which may become vested in them under this

act; *but this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation under this act*, according to the true intent and meaning thereof."

Now, as we have already seen, it is admitted that ever since the execution of the lease by the Canal Company to the Railroad Company in 1871, the property here taxed has been "possessed, occupied and used" not by the Canal Company, but by the Lehigh Valley Railroad Company, and will continue so to be possessed, occupied and used until the expiration of the Canal Company's charter, the lease being a perpetual one. In view of this fact the Court of Errors & Appeals of New Jersey through Mr. Chief Justice Gummere, properly held (case, p. 71) that whatever was the character of the exemption, it was lost by reason of the fact that limited as it was, in its life to the possession, occupancy and use of the property by the Canal Company itself, it could not be said to have survived the cessation of such possession, occupation and use that resulted from the lease aforesaid, and that therefore the property was properly taxable.

No room is left for doubt upon this question. Plainer language could not have been used. If the view of this court be, that notwithstanding the existence of an unlimited exemption from taxation in the character of a company, such exemption will not be construed, as against the taxing power, to have passed in a lease, transfer or conveyance of the property, which fails to include the word "immunities" *a for-*

tiori how much less will it pass when the very clause creating the exemption, expressly confines it to a period so long as the exempted property is used, possessed and occupied by the chartered company?

In *City of Rochester* v. *Rochester Rlwy. Co.*, 182 N. Y., 99, the failure of the charter to include the words "successors and assigns" in a general exemption was held sufficient to prevent the right of the transferee of the property to claim the exemption. The same reasoning was adopted by the Supreme Court of Texas in *International & Great Northern Railway Co.* v. *State*, 12 S. W. Rep., 685.

See also *Lake Drummond Canal & Water Co.* v. *Commonwealth* (Supreme Court of Appeals of Va.), 49 S. E. Rep., 506.

The taxing power is never presumed to have been lost or abandoned. Every presumption points in the other direction, and the burden is upon the party claiming the exemption to plainly show that it is entitled thereto. To doubt is to deny, but here there is no doubt.

It is respectfully submitted that the judgment of the New Jersey Court of Errors & Appeals sustaining the tax is in all respects correct and should be affirmed.

EDMUND WILSON,
Attorney General of New Jersey.
ROBERT H. McCARTER,
Special Counsel.

April 3, 1911.

Supreme Court of the United States

—October Term 1914.
No. 71

Office Supreme Court, U. S.
FILED.
MAR 18 1911
JAMES H. McKENNEY,
CLERK.

MORRIS CANAL AND BANKING COMPANY, et al
Plaintiffs-in-Error
vs.
DAVID BAIRD, et al., State Board of Assessors of the State of New Jersey, and J. WILLARD MORGAN, Comptroller of said State

In Error to the Court of Errors and Appeals of the State of New Jersey.

BRIEF FOR PLAINTIFFS IN ERROR

GILBERT COLLINS
Counsel for Plaintiffs-in-Error

Telephone 1949 Cort The Wolfsonthal Print 38 Broadway N Y

Supreme Court of the United States

October Term, 1910.
No. 124.

MORRIS CANAL AND BANKING COMPANY AND LEHIGH VALLEY RAILROAD COMPANY, *Plaintiffs-in-Error.* vs. DAVID BAIRD, et al., constituting State Board of Assessors of New Jersey, and J. WILLARD MORGAN, Comptroller of said State.	In Error to the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF GILBERT COLLINS FOR PLAINTIFFS-IN-ERROR.

Statement.

This writ of error brings up from the New Jersey Court of Errors and Appeals a judgment (p. 74) affirming the judgment of the New Jersey Supreme Court (p. 2) which affirmed the tax against the plaintiffs in error and dismissed the writ of certiorari by which it was reviewed before them, being the tax levied by the New Jersey State Board of Assessors for the year 1906 on the waterway, franchise and personal property used in commerce of the Morris Canal, which were valued at $2,844,046 and on which there was levied a tax of $51,221.27 (pp. 10, 11, 12). From this tax the plaintiffs in error had appealed to the State Board of Assessors sitting in Review,

(p. 56) on the ground that the property was exempt from taxation under the contract contained in the charter of the Morris Canal and Banking Company, approved December 31, 1824; and upon the confirmation of the tax by said Board the same was removed by writ of certiorari (p. 5) to the New Jersey Supreme Court for further review.

The sole question in the case is whether that irrepealable contract, contained in the charter (p. 28, par. IV), the existence and inviolability of which are not denied, may be availed of by the lessee of the Morris Canal and Banking Company as well as by the Company itself. The exemption clause is as follows:

> "IV. No state, county, township or other public assessments, taxes or charges whatsoever shall at any time be laid or imposed upon the said canal company, or upon the stocks and estates which may become vested in them under this act; but this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation under this act, according to the true intent and meaning thereof; and no tax shall be imposed upon any property of said company, or of other persons transported or used upon or about said canal of greater amount, according to the value of the article taxed, than shall at the same time be imposed upon the property of the same or similar kinds in the State of New Jersey."

Errors Assigned.

The errors assigned in the New Jersey Court of Errors and Appeals are stated in the Record (p. 68). The one particularly to be urged in this Court is the Ninth and may be stated as follows:

The State of New Jersey, by irrepealable contract in the charter of the Morris Canal and Banking Company, passed in 1824, exempted from State taxes the Canal Company, its stocks and estates, occupied and used for the necessary purposes of canal navigation. That the contract is irrepealable is conceded by the State, and the Court of Errors and Appeals so held (p. 72). That Court erred in holding that this contract of exemption cannot be availed of by the Lehigh Valley Railroad Company, to whom the Canal, with its appurtenances and all the corporate franchises, (except that of being a corporation,) and all the corporate rights and privileges, were leased (p. 45) by authority of the State Legislature given by Act of 1871 (p. 42), the lease being further recognized by the Act of 1873 (p. 44) and being sustained as valid by the Court of Errors and Appeals in 1875 in *Stewart vs. Lehigh Valley R. R. Co.*, 38 N. J. Law, 505.

The Act under which the tax was levied, "An Act for the taxation of railroad and canal property", (passed in 1884, revised and amended in 1888, N. J., Pamph. Laws, 1888, p. 269; found also in N. J. General Statutes, p. 3324), if it be held to apply to that part of the Morris Canal occupied and used "for the actual and necessary purposes of canal navigation", as was held by the said New Jersey Court of Last Resort in this case, impairs the obligation of the said contract of exemption from taxation between the State and the Canal Company, in violation of Article I, Section 10, of the Constitution of the United States.

POINT I.

The contract of exemption of the Morris Canal from taxation was not a bounty conferred on any particular company, nor an agreement made merely in view of presumptive benefits to the people. It was a contract of exemption of certain specific property, for an adequate consideration, to wit, the conveyance of the property itself to the State, possession to be taken at the end of a term of years, the owner meantime to devote the property to public use on terms controlled by the State, and for other substantial considerations.

Most statutory exemptions from taxation are mere bounties, or at best favors in view of the benefits which the people may be supposed to receive by the opening of new facilities for travel or the like; but others are given as payment for valuable credits or properties which are to pass to the State itself.

The contract of exemption of the Morris Canal is made for considerations of both sorts, and for the further consideration of inducing the investment of capital in a novel and difficult enterprise. The very preamble of the charter (p. 27) recites that:

> "The construction of a Canal to unite the river Delaware near Easton with the tide water of the Passaic, will be of great public benefit and advantage to the people of New Jersey."

It also recites the benefits the State will secure, and the inducement which it intended to offer to investors, to wit:

> "Now, therefore, in order to secure to the State the results of this public work, and also as an inducement to a company to engage in this important undertaking, and in consideration of the risks and expenditures which they may encounter in its execution and operations, Therefore be it enacted," etc.

The significance of the designation of the Canal as *"this public work"* will be better understood by an examination of the charter. By section XXV (p. 31) the Canal is declared to be forever

> "A public highway, free for the transportation of any goods, commodities or produce whatsoever on payment of the tolls * * * and it shall be lawful for the legislature of of this state, at any time hereafter, to appoint three commissioners for the purpose of fixing and regulating the tolls to be taken on said canal; which shall be done by the said commissioners in conjunction with two commissioners to be appointed by the canal company."

The Court of Errors and Appeals in *Barnett vs. Johnson*, 15 N. J., Eq. 481, 485, has construed this section and held that the State

> "Gave the company the power to build it (the canal) and to all the people the privilege to use it upon paying the tolls. The State did not deem it expedient to construct the work itself, but constituted the company its agent for that purpose. It paid the corporators with tolls, * * * The company accepted the charter, built the work and dedicated it to the public as a highway. * * * The canal is therefore, by its nature, by long use by dedication and by express statutory enactment a public highway" (p. 486).

The State not only made the canal a public highway but retained the right of fixing the charges thereon. It was to be similar to a toll road, free to all to pass with their own vehicles. The Canal Company was given no power to own or operate boats. It simply provided the way for others. The fourteenth and following sections gave banking powers for 31 years, the motive being stated as follows:

> "For the encouragement of so great an undertaking, as the erection of said canal, and in some measure to induce capitalists and others to subscribe for the same."

By section XXIII the Company was given 15 years in which to complete the canal. By section XXVI the State could take the canal at a valuation at the end of 99 years, (to wit, in 1924) and failing to do so the charter continues for 50 years more "when it shall cease, and the said canal and its appurtenances become the sole property of the State" (to wit, in 1974). By section XXVIII the Act was made a public act. By section XXVII the company is forbidden to "demise, grant, alien or sell" any lands, waters or streams required for the use of the canal.

Here are displayed at least five substantial considerations for the contract of exemption: (1) the great public benefit and advantage to the people; (2) the securing to the State of a great public way with tolls to be controlled by the Legislature; (3) the inducing of "Capitalists" to engage in this important work, in view of its risks and expenditures, and for their encouragement in so great an undertaking; (4) prohibition of alienation of the property; (5) *the vesting of the sole ownership of the entire property by operation of law, in the State as remainderman after the company's limited term.*

We find no reported case of exemption from taxation with considerations so real, meritorious and adequate as those in the case of the Morris Canal and Banking Company. Indeed, it is difficult to call to mind any similar instance of the actual conveyance to the State of the entire property, unless it be that of the subways recently constructed in the City of New York, where the City lent its credit to raise the money to build the railroad and exempted it from all taxes for seventy-five years, the city to become owner of the same without payment at the end of that time. In the case of the Morris Canal the State loaned no credit, nor gave anything except the franchises and the exemption from taxes on part of the property.

At the end of one hundred and forty-nine years (that is, in 1974) this toll road becomes, by the operation of the statute, the sole property of the state (p. 31, section XXVI). The charter made the Canal Company the owner for a term of years and vested the remainder in the State. No further deed or act of any sort is necessary, but by operation of existing public law the canal is to become the sole property of the State in 1974. The canal, with its essential appurtenances, is, throughout the charter, carefully distinguished from the rest of the property which the company may own. Thus, on page 28, section XXIV, in the clause exempting the property from taxation, it is enacted that "this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation". In section XXV it is the "canal" that is the public highway. In section XXVI it is the "canal

and it its appurtenances" which pass to the state in 1974. By section XXVII the company is forbidden, under the form of condemnation to take any lands or waters "but such only as are actually necessary for the erection and use of said canal for the purposes of navigation", and under its powers to convey lands, it is forbidden "to demise, grant, alien or sell any such lands, waters or streams taken or pretended to be taken, or required, for the use of said canal". Thus, in the Leasing Act of 1871 (p. 43, section III), the Canal Company is authorized to use the surplus waters of the canal "not needed for the purpose of navigation".

The theory running through the whole course of the legislation is that the canal, with its essential appurtenances, is public property, a public highway, free to all on payment of tolls fixed by the state; the possession and user whereof, to be sure, are with the subscribers who built it, until 1974; the remainder belongs to the state. Indeed, the theory from the first was that a public canal for the State of New Jersey was to be built, and to avoid raising the money by the state and to induce private investors to raise the needed funds and to build the work, they were given use of the property for a limited term of years, with exemption from taxation, and certain valuable banking powers for a shorter term of years, in consideration that the whole property should go to the state without payment at the end of the term. The exemptions are appurtenant to that canal and to nothing else. There is no indication that there was any design to confine them to certain specific individuals as personal benefits or bounties. The incorporators and any associates they could find were to be induced to

form the company "to engage in this important undertaking" and to hazard "the risks and expenditures which they might encounter in its execution and operations" (p. 27), "and for the encouragement of so great an undertaking as the erection of said canal and in some measure to induce capitalists and others to subscribe to the same", banking powers were given and the exemption was given. There is not the least suggestion in the act of rewarding any corporation or any class of people, but rather the intention to induce any capitalists or subscribers to venture their money in this new and hazardous undertaking, to the end that the state might secure this great public highway.

The prohibition of alienation of the canal or any of its essential appurtenances while all other property of the company might be freely conveyed, indicates the purpose of the legislature to preserve this public highway, thus exempted and devoted as a public highway.

By the second section of the charter (not printed in record) six public commissioners, three from the State of New Jersey and three from the State of New York (not promoters) were appointed to open books of subscription, to advertise for subscribers, and to raise a million dollars to begin the work. The whole enterprise was as essentially a public enterprise as it could be made and still retain at all the form of a private corporation. Instead of following the plan of the State of New York, in building the Erie Canal directly from public funds, the State of New Jersey induced the building of this public canal with private funds by the offer of its exemptions and tolls for a term, thus securing the extraordinary agreement in return that the entire

canal should be the property of the state. The exemptions were extended not at all to the individuals but to the public canal and absolutely to nothing else. Words could not make it plainer that the exemption from taxation was to extend to nothing but the public work in which the state had the remainder.

The courts of New Jersey, in repeatedly construing the charter, have uniformly narrowed the exemption to the lands occupied by this public highway. The exemption was construed in *State vs. Betts*, (1854) 24 N. J. L., 555; in *Morris Canal vs. Jersey City* (1859) 12 N. J. Eq., 227, and in *Morris Canal vs. Haight*, 35 N. J. L. 178 (1871); and the court said that "the exemption from taxation was limited to the company's property essential to the canal use."

To the same effect was *Morris Canal vs. Love*, (1874) 37 N. J. L., 60; so in *Lehigh Valley R. R. vs. Newark*, (1882) 44 N. J. L., 323, and *Morris Canal vs. Cleaver* (1884) 46 N. J. L., 467.

In a few words, the State said to the promoters of the canal company;

> "If you will build a public canal from the Delaware to the Hudson and put it in use before 1839, the state will fix the tolls thereon, which you may collect and enjoy until 1974, and no taxes shall be levied on this public canal for the same period; at the end thereof your occupancy will cease and the state will come into the possession of the canal as its absolute property."

This was not a bounty, not a gift in view of presumptive benefits to the people, not a favor, not an insecure personal immunity which might be swept away under a strict rule of adverse construction, but was a solid contract for a full con-

sideration, the repudiation whereof can no more be justified than the refusal to pay an honest debt for money borrowed. Such a repudiation by the state amounts, in fact, to confiscation of the company's property. This is made all the stronger when we remember that the change of possession of the canal from the Canal Company to the Lehigh Valley Railroad Co. was made by express legislative authority.

In *New Jersey vs. Wilson*, 7 Cranch, 164, a case was presented to this court very similar to the present case, in that an actual consideration passed to the state in return for the exemption of certain lands from taxation. And this exemption was held to pass to the grantee of such lands, the grant being made by authority of a legislative act which made no mention of the exemption. In 1758 the remnant of the tribe of Delaware Indians had claims to a considerable portion of lands in New Jersey. In order to extinguish these claims and to quiet title to these lands, the legislature passed an act by which a tract of land was settled upon the Indians in consideration that they would release their claim to all other lands in New Jersey, south of the River Raritan. This act, among other provisions, restrained the Indians from granting leases or making sales of the lands to be settled upon them and enacted,

> "That the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law, usage or custom to the contrary thereof, in any wise notwithstanding"

In 1801 the Indians became desirous of migrating to the State of New York, and obtained an act of the legislature authorizing a sale of the land settled upon them. The act contained no expres-

sion in any manner respecting the privilege of exemption from taxation. In 1803 the lands were sold to one Painter and others. In 1804, the legislature passed an act repealing the exemption clause in the act of 1758. The court held that this repealing act violated the constitution of the United States in impairing the obligation of the contract created by the act of 1758. The court said:

> "Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangements previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it."
>
> *"It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on.* The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He

> stands, with respect to this land, in their place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

The facts in the case cited and in the present case are almost identical. As in the present case we have an exemption from taxation in consideration of an actual benefit to the state in the relinquishment of a claim of title to certain lands, as well as the presumptive consideration of the general benefit to be derived from the quieting of titles in a large section of the state. The same act prohibited the granting of leases or making of sales as in the present case (p. 31, sec. XXVII). The prohibition is removed by a special act as in the present case (p. 42). This act contains no mention specifically of the exemption from taxation which is true also of the present case. The state afterwards attempted to tax the exempted lands in the hands of the grantee as in the present case. This court held that the privilege, though for the benefit of the Indians, is annexed by the terms which created it *to the land itself,* not to their persons. Such were the terms of the charter of the Morris Canal & Banking Company. Is it possible that there is any distinction to be drawn between the two cases which would furnish ground for a different decision in the present case? So far as there is a distinction the Morris Canal case is much the stronger; for whereas the title of the Indians was a mere "claim", necessarily of doubtful validity and indefinite extent, the title of the Canal Company and its enormous expenditures of money were things certain, and of unquestionable value.

Discussion of the Cases.

Among the numerous cases brought before this court involving exemptions from taxation, there are none which appear to be at all in the same class with the case of the Morris Canal, excepting the above discussed case of *New Jersey vs. Wilson.* The Wilson case was one of ample and full consideration. The Morris Canal case presents not only a full and adequate consideration, but has the further support that the property exempted is exempted because it is public property.

Even in the cases where much weaker considerations are presented, these contracts have been sustained.

Thus, in *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S., 654, the exclusive right to lay gas mains in the streets of the City of New Orleans had been granted to one corporation which later consolidated with another gas light corporation under a general consolidation law which declared that such consolidated company should hold and enjoy "all the rights, privileges, powers, franchises and property belonging to each." A subsequent constitutional prohibition upon monopolies was passed by the State. It was contended that this abrogated the monopoly feature in the charter of the consolidated company. It does not seem to have been seriously contended that this privilege did not pass by the consolidation, and in fact the Supreme Court held that it did, and that the new company succeeded to the exclusive contract of the old company with the State, and that such contract was protected by the clause of the Federal Constitution prohibiting the impairment of the obligation of contracts.

In *Chesapeake & Ohio R. R. Co. vs. Virginia*, 94 U. S., 726, by legislation the Chesapeake & Ohio Railroad Company, a new corporation, became vested with the rights, interests and privileges of the Covington & Ohio Railroad Company and of the Virginia Central Railroad Company. Amongst the privileges of the Covington & Ohio Railroad Company was an exemption from taxation. It was held that the original exemption passed to the new company, as to so much of the property of the constituent companies as was brought in to the consolidated company under the legislative agreement, but that exemption of other property was not contemplated by the charter. The consideration in this case was presumptive and not actual.

In the case of *Central Railroad & Banking Company of Georgia vs. Georgia*, 92 U. S. 670: the decision is based on the same grounds as that in the preceding case, and it was held that an exemption from taxation granted to an original corporation afterwards inures to the benefit of a new corporation created by the consolidation of the original corporation with another corporation to the extent of the exempted property brought in by one of the original corporations. This was a case of bounty or at best of presumptive considerations and not of any actual consideration. The act of consolidation simply authorized the two railroads

> "to unite and consolidate stocks of the said two companies and all the rights, privileges and immunities, property and franchises belonging or attaching to said companies, under the name and charter of the said 'The Central Railroad & Banking Company of Georgia' ".

So in the case of *Powers vs. Detroit etc., Ry.*, 201 U. S., 543, the distinction between exemptions 'ounded upon supposed benefit to the people, that s to say, on "presumptive" considerations, and

those founded upon actual, tangible considerations, was clearly drawn. A railroad was granted in its charter, in 1855, an immunity from taxation on payment of annual tax of one per cent. on its capital stock. *Held*: that this being a special act, it created a contract by which private capital was induced to enter on an important public enterprise, and was not a mere bounty, and could not be repealed.

The railroad afterwards passed through two foreclosures and reorganizations, one in 1860 and one in 1878, but no new corporation was thereby created. *Held*: that the contract of immunity from taxation survived.

In the course of the decision the court said (p. 556):

> "It is contended in the first place that this is a mere gratuity, which can be withdrawn at any time.
>
> *Wisconsin & Michigan Railway Co. vs. Powers*, 191 U. S., 379, is cited as authority. But the difference between that case and this is obvious. That arose on a general law in respect to taxation; this on a provision in a special act having reference to a particular corporation, an act which called for and received acceptance by the corporation. It was said in the opinion in that case (p. 385):
>
> " 'A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in * * * * 13 Wall. 373 (*'Salt Company vs. East Saginaw'*); S. C., 19 Michigan, 259. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. *Rector &c. of Christ Church vs. Philadelphia County*, 24 How.,

300; *Tucker vs. Ferguson*, 22 Wall. 527; *Grand Lodge &c. of Louisiana vs. New Orleans*, 166 U. S. 143. * * *

"That there was ample consideration for a contract in this case is shown by the opinion of the Supreme Court * * * * 'The act of 1855 was not promoted exclusively in the interest of the railroad companies named in it, but the State itself was largely concerned, and expected to accomplish important public purposes by means of it.

" 'It has already been seen that the important public purpose, which the state had in view in assenting to the act of 1855 has been accomplished; the railroad from Pontiac to Lake Michigan has been constructed and for many years operated, and the State has reaped the benefits. But in order to accomplish this public purpose it seems to have become necessary to put the bonds and shares of the Detroit and Milwaukee Railway Company upon the market as well in Europe as in this country; the State recognized the necessity, and by its legislation provided for facilitating sales. The bonds and shares were sold to the amount of very many millions; and every purchaser of one of them made the purchase in reliance upon legislation of this State which appeared to sanction if not to invite it' * * *

"Surely no clearer case of contract can be presented than one in which a legislature passes an act in respect to a particular corporation making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation and the completion of an unfinished road, whose completion is deemed of great public importance, and where the special provision is, as required, formally accepted, the expenditures made and the road completed."

So in *Tennessee vs. Witworth*, 117 U. S., 129, in which a company was incorporated and granted all the rights, powers and privileges of another company, it was held that the second company had the

same right of exemption from taxation as the first, the same being carried by the word "privileges." So in *Humphrey vs. Pegues*, 83 U. S., 244, a similar case, the same result was reached. See also *Philadelphia & Wilmington R. Co. vs. Maryland*, 10 How. 377; *County of Green vs. Conness*, 109 U. S. 104.

There are numerous other cases where the exemption was denied in the hands of the assignee company. These will be found to fall within four classes, to wit:

(a) Where the mortgage, lease or transfer was made without express statutory authority.

Memphis R. R. Co. v. Commissioners, 112 U. S., 609;
Chesapeake & Ohio R. R. Co. v. Miller, 114 U. S., 176;
Pickard v. E. Tenn. R. R. Co., 130 U. S., 637;
Mercantile Bank v. Tennessee, 161 U. S., 161;
East Tenn. R. R. Co. v. Camden Co., 102 U. S., 273;
Wilson v. Gaines, 103 U. S., 417;
Louisville &c. R. R. Co., v. Palmer, 109 U. S., 244;

(b) Where the corporation claiming the exemption was not created until a constitutional bar to exemption had been interposed.

Trask v. McGuire, 18 Wall., 391;
Keokuk &c. R. R. Co. v. Missouri, 152 U. S., 301;
Atlantic &c. R. R. Co. v. Georgia, 98 U. S., 359;
St. Louis &c. R. R. Co. v. Berry, 113 U. S., 465;

Memphis &c. R. R. Co. v. Berry, 112 U. S., 609;
Minneapolis & St. Louis Ry. Co. v. Gardner, 177 U. S., 332;
Shields v. Ohio, 95 U. S., 321;
Maine Cent. R. R. Co. v. Maine, 96 U. S., 509;
Yazoo & Miss. Valley Ry. Co. v. Adams, 180 U. S., 1, 18;
New York v. Cook, 148 U. S., 406.

(c). Where from surrounding words and circumstances it is apparent that the legislature did not intend the exemption to pass to the successor.

Phoenix Fire Ins. Co. v. Johnson, 161 U.S., 174;
Chicago &c. R. R. Co. v. Missouri, 122 U. S., 561;
Wilmington &c. R. R. Co. v. Allsbrook, 146 U. S., 279;
Chesapeake & Ohio R. R. Co. v. Miller, 114 U. S., 176;
East Tenn. R. R. Co. v. Camden Co., 102 U. S., 273;
Wilson v. Gaines, 103 U. S., 417;
Citizens St. Ry. Co. v. Memphis, 53 Fed., 715;
Minot v. P. W. & B. R.R., 18 Wall., 206;
Bancroft v. Wicomico Co., 121 Fed., 874, affd. 135 Fed., 977;

(d) Where the intent to pass the immunity was not sufficiently clearly expressed.

Covington & Lexington R. Co. v. Sanford, 164 U. S., 578
Norfolk & W. R. R. Co. v. Pendleton, 150 U. S., 673.
Peoples' Gas Light & Coke Co. v. Chicago, 194 U. S., 1.

St. Louis & San Francisco Ry. v. Gill, 156 U. S., 656.
Morgan v. Louisiana, 93 U. S., 217.

Even in those of the foregoing cases in which the transfer of the contract of exemption has been upheld, it will be noted that there was no actual consideration passing from the company to the State, but only the "presumptive consideration" of supposed benefit to the people, and in no case was the exemption in favor of any specified property such as the Canal property, as is the case here, but the exemption was simply a general exemption of the property or more often the capital stock of the corporation. We have, therefore, two elements in the present case which are alone sufficient to distinguish it from any of the cases in which the transfer of the exemption has been denied, and which would form added reason for upholding the transfer of the exemption had they been present in the cases in which that was done.

POINT II.

The reluctance of the courts to enforce contracts of exemption because relieving property from the common burden which public policy requires shall be equally borne, has no just application to the case now before the court.

The inclination of the courts to deny recognition of contracts of exemption from taxation where any tenable ground can be found therefor, is based upon considerations which are thus stated by Mr. Justice Field in *Minot v. P. W. & B. R. Co.,* 18 Wall, 206, at pp. 225, 226:

"It has been repeatedly held by this court that the Legislature of a State may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected. And when such immunity is conferred, or such limitation is prescribed by the charter of a corporation, it becomes a part of the contract, and is equally inviolate with its other stipulations. But before any such exemption or limitation can be admitted, the intent of the Legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is, that rights, privileges and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule. And with special force does the principle, upon which the rule rests, apply when the right, privilege or immunity claimed calls for any abridgement of the powers of the government, or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has said, the whole community is interested in retaining it undiminished, and has 'a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' *Bk. v. Billings*, 4 Pet., 561. If the point were not already adjudged it would admit of grave consideration, whether the Legislature of a State can surrender this power, and make its action in this respect binding upon its successors any more than it can surrender its police power or its right of eminent domain. But the point being adjudged, the surrender when claimed must be shown by clear, unambiguous language, which will ad-

> mit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the Legislature, that doubt must be solved in favor of the State."

See also the remarks of the same Judge in *Morgan v. Louisiana*, 93 U. S., 217.

Such considerations have little pertinency in the case of the Morris Canal, where the State has chosen, as was said in the case of *Barnett v. Johnson, supra,* to build its public work, not with public money, but with private funds, and where private capital to the extent of millions of dollars was embarked in a State enterprise upon the distinct understanding that it should never be paid back, except as it might be retrieved by the tolls which might be collected for a limited period; even those tolls to be fixed from time to time by the Legislature. That the canal will not be taxed after it passes to the State is very clear; but why not? Because it is public property, created solely for public use. But it is no less so during the terms of years while the company operates it for the State. And the State by the most unequivocal legislation and contract has so provided.

The provision that the canal shall be free of taxes for the term of years presents a substantial contract where the contractor not only gives money consideration for what he gets, but of necessity undertakes great risks so that the State may be relieved from expenditures, and relieved from the hazards involved in building its public works. It may frequently occur, as it has occurred in the case of the Morris Canal, that substantially the entire investment of private capital is lost.

By the Chancery Decree of October 14, 1843 (p. 60), it appears that the Canal Company had failed previous to that time, or within about seven years after the canal was opened to navigation, and

judgment of foreclosure had been entered against it. By Act of 1849 (p. 37) the Legislature cut its capital stock down from $4,100,000 to $1,250,000 and compelled the raising of $1,175,000 new capital by the sale of preferred stock, and the surrender of the Company's banking powers as a condition of retaining possession of the canal, and these hard terms were accepted by the Company (pp. 39-40).

Obviously the Canal was too costly to be profitable; and the State had secured the great convenience of this public highway at the expense of its citizens and others who had been so unfortunate as to invest in it. It did, however, leave them in possession for the term with the irrepealable contract of tax exemption.

POINT III.

The exemption from taxation passed to the lessee.

Counsel for the State laid great stress upon the fact that the leasing Act (p. 42), authorized the Canal Company "to lease the canal of said Company or any part thereof, with all or any of its boats, property, works, appurtenances and franchises" without using the words "privileges and immunities," although the lease was somewhat broader in its terms; and it is urged that the contract of exemption from taxes was thereby divested from this property, and that this public canal thereupon became subject to taxation in the hands of the lessee, although it would not be in the hands of the Canal Company. The learned Chief Justice in his opinion below (p. 73) intimates that it may be that if the lease were terminated and the property should revert to the lessor, the exemption from taxation would be revived; but that it must be considered to be suspended while the lessee holds the property.

If the exemption from taxation were a mere personal privilege given to the Canal Company, there would be force in this suggestion; but the Chief Justice himself shows that the contract was not especially to exempt the Canal Company from taxation, but to exempt the property itself, to wit, so much of the Canal Company's property as constituted the public highway known as the Morris Canal.

Moreover, the leasing Act plainly authorized the Canal Company to lease "the canal of said company or any part thereof with all or any of its boats, *property*, works, appurtenances and franchises" (Case, p. 42). The Canal Company had no more valuable property than its firm contract with the State relieving it from paying taxes on this public canal, which it was bound to operate until 1974. It was entitled by contract to receive the tolls on that canal during the term free from any diminution by taxation. Indeed that was all it did have either in the way of property or of earning power. All else belonged to the State, and the State might as well deprive it of the power to take tolls as of the power to occupy the property without taxation. Property is not necessarily physical. Franchises are property. Contracts are property. As was said in *Boston & Lowell R. R. v. Salem & Lowell R. R.*, 68, Mass. 1, 35":

> "Property is *nomen generalissimum* and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal hereditaments."

Where the property of one corporation is by legislative authority transferred to another undoubtedly every contract right passes to the transferee, and there can be no support for the

theory that this contract right should be denied to the transferee, except on the theory that it is a bounty or personal immunity which the State has given to the grantor. Such a case is not presented by this record, as we have tried to demonstrate and as the opinion of the Chief Justice clearly shows.

POINT IV.

The judgment should be reversed and direction given that the tax be set aside with costs.

GILBERT COLLINS,
Counsel for Plaintiff-in-Error.

Telephone 788 Cort The Weibezahl Print 38 Broadway N Y

Office Supreme Court, U. S.
FILED
OCT 1 1915
JAMES D. MAHER
CLERK

4

Supplemental Brief for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1910. No. 124.

October Term, 1915. No. 1.

MORRIS CANAL AND BANKING COMPANY ET AL.,
Plaintiffs in Error,

vs.

DAVID BAIRD et al., State Board of Assessors of the State of New Jersey, and J. WILLARD MORGAN, Comptroller of said State.

In Error to the Court of Errors and Appeals of the State of New Jersey.

GILBERT COLLINS,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

October Term, 1910. No. 124.
October Term, 1915. No. 1.

MORRIS CANAL AND BANKING COMPANY ET AL., *Plaintiffs in Error,* *v.* DAVID BAIRD ET AL., CONSTITUTING STATE BOARD OF ASSESSORS OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE.	*In Error to the Court of Errors and Appeals of the State of New Jersey.*

Supplemental Brief for Plaintiffs in Error.

This cause, by consent of the Court, has been postponed from term to term since it was first put on the list and briefs filed at the October term, 1910, and will now come on for argument. We beg leave to call the attention of the Court to the applicability to the case in hand of two of its recent decisions, both decided on March 22, 1915. One is *William A. Wright, Comptroller General of Georgia, appellant, v. Central of Georgia Railway Co., 236 U. S. 674*, and the other *William A. Wright, Comptroller General of Georgia, petitioner on certiorari, v. Louisville & Nashville R. Co., 236 U. S. 687.* The opinion in each case was by Mr. Justice Holmes—the first named being the controlling decision from which there was some dissent. Certain railroads were built under special charters,

admitted to constitute irrepealable contracts by which the property was not subject to be taxed higher than one-half of one per cent. upon its annual income. The companies were authorized to demise their railroads, and did so. For many years the charter-tax only was assessed against the lessee, but in 1912 the State assessed and attempted to collect *ad valorem* taxes on the fee simple of the property in the hands of the lessee. This was enjoined in the Court below, and the injunction was sustained on appeal. The learned Judge who spoke for this Court said:

> "We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the State an unlimited right to impose upon the lessee all that it had renounced as against the lessor. For that was to give notice to the parties, if they were supposed to know the law, that the exemption would be lost if the income was earned in one of the contemplated ways, or if they were supposed ignorant, was to invite them to a bargain that was to have an unexpected and disastrous result."

In the second case the main question was the same as in the first and was similarly decided, the only additional feature being that this Court held that the exemption extended to betterments and improvements of the demised railroad. The cases seem to me indistinguishable from that at bar, and the view of the dissentients (in the first case) stated by Mr. Justice Hughes only emphasizes the point of unconstitution-

ality as applied to the New Jersey statute now challenged.

The decision of the State Court is of course open to review by this Court, for the point involved is that the New Jersey Tax Law impairs the obligation of the contract made between the State of New Jersey and the Morris Canal and Banking Company, on which the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, on taking a lease, by express authority of the State, had a right to rely. In such a case this Court must exercise its independent judgment. *Douglas v. Kentucky, 168 U. S., 489.* Even if it had been adjudged by a line of previous decisions of the State Court of last resort that such a taxing act did not impair the obligation of like contracts, the point would be open in this Court. *A fortiori* must this be so when the writ of error reviews a decision rendered for the first time in the very case brought up by the writ. It was said in this Court in the case of *People ex. rel. Interborough Rapid Transit Co., plaintiff in error, v. William Sohmer, Comptroller of the State of New York*, decided April 12, 1915, 59 Lawyers' edition, 549, a decision affirming a State tax, notwithstanding a claim that the law under which it was levied impaired the obligations of a contract:

> "The construction of the statute by the Court of Appeals although not conclusive upon its meaning as a contract is entitled to great deference and respect."

This Court approved the literal interpretation of the statute as correct, notwithstanding "a certain perfume of general exemption." Paraphrase the words first quoted, and apply the doctrine to a case where this Court differs in opinion from the State Court, and I submit that the result will be as follows:

"The construction of the statute by the New Jersey Court of Errors and Appeals, although entitled to great deference and respect, is not conclusive upon its meaning as a contract."

The judgment should be reversed and the tax annulled.

GILBERT COLLINS,
Of Counsel with Plaintiffs in Error.

Supreme Court of the United States

OCTOBER TERM, 1910, No. 124.

OCTOBER TERM, 1915, No. 1.

MORRIS CANAL AND BANKING COMPANY AND LEHIGH VALLEY RAILROAD COMPANY, *Plaintiffs in Error.* *vs.* DAVID BAIRD, *et al.*, constituting the STATE BOARD OF ASSESSORS of the State of New Jersey, *et al.*, *Defendants in Error.*	*In Error to the New Jersey Court of Errors and Appeals.*

Supplemental Brief for Defendants in Error.

The filing by the plaintiffs-in-error of a supplemental brief is the occasion for this reply thereto. The railroad company directs the court's attention to the two recent cases of *Wright, Comptroller, v. Central Georgia Railway Co.*, and *Wright, Comptroller v. Louisville & Nashville R. Co.*, 236 U. S., 687, *et seq.*, and its counsel says of them:

> "The cases seem to me indistinguishable from that at bar."

It is respectfully contended that there is the greatest difference between these cases and the case at bar. The judgment of this court as expressed in the prevailing opinion in the first of the cases referred to was based wholly upon the fact that the same act of the legislature, which gave a chartered existence to the railroad companies,

and bestowed upon them the peculiar tax privilege and exemption, likewise contained the provisions authorizing the lease which subsequently was entered into. The charter, after providing that the company should have, so long as it saw fit to exercise the privilege, the exclusive use of the railroad for the transportation or conveyance of passengers and property, for which privilege it was given the right to charge freight also stated:

> "Provided always, that said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation greatest difference between these cases and the to any individual or individuals, or other company, and for such term as may be agreed upon."

Referring to this legislation the opinion says:

> "It will be perceived that when this section was drawn it was supposed that different persons might be allowed to put their carriages upon the new form of road, as perhaps may be seen even more clearly in other early charters in Georgia and elsewhere. And the revenue that was to be derived from the exclusive privilege granted might be obtained by doing the whole business, by letting in others to share a part of it, or by making a lease of the whole. Any one of the three courses is permitted, one deemed as likely as another, and also so far as appears, all standing alike in the mind of the legislature in respect of any legal effect upon the other grant of rights.
>
> "The foregoing view of section 16 would lead us to believe that no change in the matter of tax exemption was expected to follow upon the demise of the road, any more than it would have followed from the admission of another carrier to partial rights, or of an individual

to carry his own goods. But that is only an introduction to further considerations. We cannot suppose that the legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the state an unlimited right to impose upon the lessee all that it had renounced as against the lessor. For that was to give notice to the parties, if they were supposed to know the law, that the exemption would be lost if the income was earned in one of the contemplated ways—or, if they were supposed ignorant, was to invite them to a bargain that was to have an unexpected and disastrous result."

The conclusion was that inasmuch as the same charter which gave the tax privilege or exemption, likewise bestowed the privilege of leasing, the legislative intent was to permit the exemption to exist in whatever form the chartered company might desire to exercise the privileges granted by the Act. The opinion adds:

"We are not suggesting that the contract in the charters of the lessors passed by assignment to the lessee, nor are we implying that the property was exempted generally into whosoever hands it might come. We are dealing only with the specific transaction permitted and encouraged by the acts of 1838 and 1852, and saying that we cannot reconcile it with our construction of those acts to allow that transaction to change the position for the worse. We construe those statutes as making the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor—the protection of the lessee being necessary in order to make good that promised to the lessor."

How different is the situation in the case at bar! Not only did the original charter of the Morris Canal & Banking Company not authorize a lease of its property or franchise, but in its 27th section (Record, p. 32) an express prohibition against the leasing or alienation of the lands, waters or streams taken under the charter, to another person or corporation, is contained. The limited right of leasing (subsequently bestowed, Record p. 36)—

> " * * * to use the water necessary for the purposes of the canal, in working other machinery than that requisite for the planes, between Boonton, in the County of Morris, and the Passaic at Newark "

accentuates the legislative intention not to bestow upon the company the right to lease generally its property and franchise. The situation then was, that the Canal Company, chartered in 1824, was not only not permitted to lease its property and franchises, but was expressly prohibited from so doing, and the same charter prohibited the imposition of any tax or assessment—

> "Upon the said canal company, or upon the stocks and estates which may become vested in them under this act, but this exemption shall not extend to any other estate or property of the company, than such as is possessed, occupied and used by said company for the actual and necessary purposes of said canal navigation under this act, according to the true intent and meaning thereof." (Record, p. 28)

As shown in the opinion of Chief Justice Gummere, speaking for the Court of Errors and Appeals (Record, p. 73)—

> "The present charter contract does not provide for a perpetual immunity from tax-

ation. It declares that the 'exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of canal navigation'. The meaning of this limitation, in view of the principle thus quoted, seems to us to be clear. By force of it the property of the company is relieved from taxation only so long as it is possessed by the company, occupied by the company, and used by the company. When any one of these three conditions ceases to exist the immunity from taxation granted by the charter comes to an end."

This construction of the phraseology of the charter by the highest court of New Jersey is not only convincing but conclusive, and hence it is difficult to imagine cases more dissimilar than the one at bar, and the two above referred to, recently decided by this court. It will be recalled that it was not until the 14th of March, 1871, nearly one-half a century after the charter was given, that the legislature bestowed upon the Canal Company, by a supplement to the original charter, the right to lease its property and franchises. (Record, p. 42)

Mr. Justice Holmes, in the prevailing opinion in the first of those cases was careful to state—

"We discuss nothing but the question before us."

That question was very different from the one now before the court. In the opinion in the second *Wright* case (possibly because of the vigorous dissenting opinion in the first case), Mr. Justice Holmes, on page 690, says:

"Thus the peculiar features of the case in hand take it without the rule applied in *Ro-*

chester Railway v. Rochester, 205 U. S., 236, and other kindred cases, from which we have no purpose to depart."

As has been shown in the main brief, the peculiar features of the case at bar bring it directly within the rule applied in *Rochester Railway v. Rochester,* supra, and hence it must be governed thereby. While the tax under review was imposed in 1906, as appears from the record (p. 16), a similar tax had been annually imposed and paid (under protest to be sure) from and including the year 1888. This court, in the *Wright* cases, is careful to advert to the influence that such practical construction for a long time by both the state and the railroad company must have upon the court in determining questions of this character, and here too, another important difference between the case at bar and the *Wright* cases appears.

Counsel for the plaintiffs-in-error on page 3 of his supplemental brief, says:

> "The decision of the State Court is of course open to review by this Court, for the point involved is that the New Jersey tax law impairs the obligation of the contract made between the State of New Jersey and the Morris Canal and Banking Company, on which the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, on taking a lease, by express authority of the State, had a right to rely. In such a case this Court must exercise its independent judgment. *Douglas v. Kentucky,* 168 U. S., 489."

This, I submit, is an inaccurate statement of the case. Undoubtedly, the Morris Canal & Banking Company, so long as it used and occupied its property and franchises strictly for canal purposes had a right to rely upon the tax exemption con-

tained in its charter. The Lehigh Valley Railroad Company was in no sense a party to that contract. It took a lease of the property by virtue of the supplement of March 1871 (Record, p. 42). The highest court of New Jersey has construed the charter as meaning that the exemption from taxation only continued so long as the property and franchises were possessed, occupied and used by the company chartered. The Lehigh Valley Railroad Company knew, therefore, that as soon as the Morris Canal & Banking Company ceased to use, occupy and maintain the property and franchises, and transferred the same to the Lehigh Valley Railroad Company, the exemption *proprio vigore* ceased; and hence when in 1888 the legislature imposed the state tax upon property of this character—an imposition that was annually renewed until 1906, the Lehigh Valley Company was compelled to find an exemption of the property from taxation in some other place than in the original charter of the Canal Company. No such exemption, however, as argued in the main brief, elsewhere appears. It is not accurate, therefore, to say that this case involves the point that the tax law impairs the obligation of the contract. The tax is not assessed against the Canal Company but against the Lehigh Valley Railroad Company, and as shown in the main brief, the only occasion for the presence of the Canal Company in this litigation is the fact that it offered itself as a co-prosecutor with the Lehigh Valley Railroad Company of the writ of certiorari to review the propriety of the assessment. The real question in this litigation is not whether the Canal Company had a contract of exemption, as that is conceded; but the point is, did that exemption pass to the Lehigh Valley Railroad Company when it leased

the property. The highest court of New Jersey has held it did not. That adjudication, I submit, is conclusive upon this court, it being well settled ever since *Jefferson Bank v. Skelly*, 1 Black, 436, that,

> "The constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court, *with a single exception*, and that is when is has been called upon to interpret the contracts of states, 'though they have been made in forms of law,' or by the instrumentality of a state's authorized functionaries in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to *revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract, which has been alleged, in the forms of legal proceedings, by a litigant, to be one*, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts."

See also *Douglas v. Kentucky*, 168 U. S., p. 488, and cases therein cited.

It is respectfully submitted that the judgment of the New Jersey Court of Errors & Appeals should be affirmed.

ROBERT H. McCARTER,
Of Counsel for the Defendants-in-Error.

October 1, 1915.

Office Supreme Court, U. S.
FILED
OCT 12 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 1

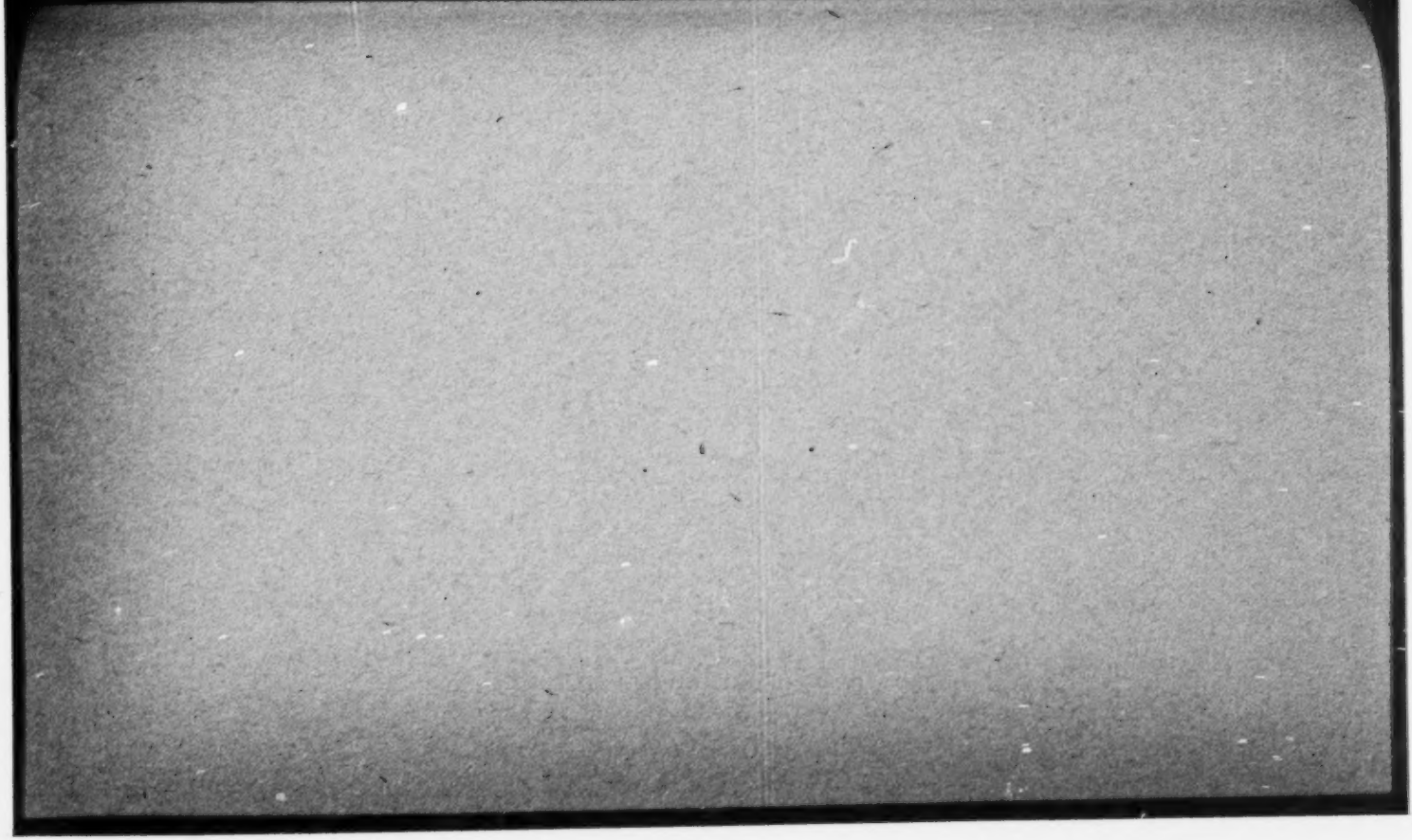
MORRIS CANAL AND BANKING COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID BAIRD ET AL., STATE BOARD OF ASSESSORS OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE, DEFENDANTS IN ERROR.

REASONS FOR MOTION TO CONTINUE.

WILLIAM I. LEWIS,
Of Counsel for Plaintiffs in Error.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 1

MORRIS CANAL AND BANKING COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID BAIRD ET AL., STATE BOARD OF ASSESSORS OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE, DEFENDANTS IN ERROR.

REASONS FOR MOTION TO CONTINUE.

This cause, by consent of parties and order of the Court, was continued at the last term and at the term of 1912 and motion is now made for a further continuance. Consent thereto by stipulation between the Attorney for the Plaintiffs in Error and the Attorney General of New Jersey, for the Defendants in Error has been filed with the Clerk of the Court.

The reasons that impelled the consent of the Court to continuance at the last term and the one preceding it were set forth in printed leaflets, copies whereof are annexed hereto.

The situation therein recited still exists, except that the Commission has now made its report. This report, if adopted by the Legislature, would dispose of the matters in controversy in the above stated cause. Owing to the fact that the report was made near the close of the session, the Legislature was unwilling to act upon it and postponed its consideration to the legislative session of 1915. It continued the Commission which made the report and made an appropriation for its expenses. The Attorney General, signing the present consent to further continuance is a member of the Commission. It is expected by the parties hereto that the report of the Commission will be acted upon by the New Jersey Legislature which meets in January 1915, and the above stated case settled thereby.

A copy of the voluminous report of the Commission is herewith respectfully presented to the Court for the purposes of reference, if desired.

Respectfully submitted,

WILLIAM I. LEWIS,
Of Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 1

MORRIS CANAL AND BANKING COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID BAIRD ET AL., STATE BOARD OF ASSESSORS OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE, DEFENDANTS IN ERROR.

REASONS FOR MOTION TO CONTINUE.

The plaintiffs in error move for a continuance of the above cause to the next stated term of this court for the following reasons:

Such continuance has been agreed to by the parties, the stipulation therefore has been signed by the attorney of the plaintiffs in error and by the Attorney General of New Jersey, attorney of defendants in error, and has been filed with the clerk of the court.

The case involves the validity of certain assessments of taxes by the State of New Jersey against the plaintiffs in error which approximate $750,000.

The present litigation is approaching a settlement, in manner following:

For some time negotiations have been pending between the Lehigh Valley R. R. Co., one of the plaintiffs in error, looking to the surrender of certain of its porperties, rights, and privileges as lessee of the said Morris Canal & Banking Co. to the State of New Jersey, and the acquirement by the railroad company of certain riparian and other rights from the State of New Jersey. In the course of these negotiations the legislature of New Jersey, in the year 1911, appointed a commission, consisting of Governor Woodrow Wilson, the State's Attorney General, and former Justice of the New Jersey Supreme Court, Mr. Bennet Van Syckel, to report the terms for the settlement of the subject-matter of such negotiations. At the session beginning in January, 1912, the commission reported for the State a tentative agreement with the railroad, which, among other things, provided, as part of the consideration to move from the railroad, that the said railroad should release its errors in this cause, pay said taxes, and the parties should consent to the continuance of this cause until the legislature had acted upon the matters contained in said report.

Thereupon the legislature, desiring further information, appointed a new commission, which consisted of the old commission, except Governor Wilson, and some new members. The legislative resolution provided for a speedy report to the next session or to a special session of the legislature to be called this year

especially to consider the report of the new commission.

The new commission has done a great deal of work, and will be ready to report at the special session or, if it is not called, at the session of 1912; when, it is expected, the present litigation will be settled.

For these reasons the continuance is prayed for as aforesaid.

I may be permitted to say that the present motion is not made by Judge Collins, of the firm of Collins & Corbin, with whom I have been recently associated in this case, owing to a meeting of the bar of Hudson county, New Jersey, held to-day, to take action upon the occasion of Mr. Corbin's death, at which meeting Judge Collins has been requested by the bar to be present.

Respectfully submitted,

WM. I. LEWIS,

Of Counsel with Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 1

MORRIS CANAL & BANKING COMPANY ET AL.,
PLAINTIFFS IN ERROR,

vs.

DAVID BAIRD ET AL., STATE BOARD OF ASSESSORS OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE, DEFENDANTS IN ERROR.

REASONS FOR MOTION TO CONTINUE

This cause, by consent of parties and order of the Court, was continued at the last term, and motion is now made for a further continuance. Consent thereto by stipulation between the undersigned, attorney for the plaintiffs in error, and the Attorney-General of New Jersey, for the defendants in error, has been filed with the Clerk of the Court.

The reasons that impelled the consent of the Court to continuance at last term were set forth in a printed leaflet, copies whereof are submitted herewith. The situation therein recited still exists. The Legislative Committee therein mentioned was unable to conclude

its labors in time to make a report at the session of 1913, and an appropriation for its further service was made by the Legislature. The Chairman of the Committee now writes as follows:

> "The members of the Morris Canal Investigation Committee have been delayed in closing up the work imposed upon them by the resolution creating the committee by reason of the fact that more time was required in obtaining appraisements, etc., than we supposed would be necessary. However, we are pushing the work as rapidly as possible and you can feel assured that a report will be made at the next session of the Legislature. I assume that this will be satisfactory and that the cases will be postponed in accordance with our understanding."

The controversies pending in the State Courts have been continued, and it is advantageous to all parties that matters should remain in statu quo until this Legislative Committee can make its report. The next session of the New Jersey Legislature will be held January 13, 1914.

Respectfully submitted,

GILBERT COLLINS,

Of Counsel with Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
OCT 7 1913
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 1.

MORRIS CANAL & BANKING COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID BAIRD ET AL., STATE BOARD OF ASSESSORS OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE, DEFENDANTS IN ERROR.

REASONS FOR MOTION TO CONTINUE.

GILBERT COLLINS,

Attorney for and of Counsel with Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 1.

MORRIS CANAL & BANKING COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID BAIRD ET AL., STATE BOARD OF ASSESSORS OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE, DEFENDANTS IN ERROR.

REASONS FOR MOTION TO CONTINUE.

This cause, by consent of parties and order of the Court, was continued at the last term, and motion is now made for a further continuance. Consent thereto by stipulation between the undersigned, attorney for the plaintiffs in error, and the Attorney-General of New Jersey, for the defendants in error, has been filed with the Clerk of the Court.

The reasons that impelled the consent of the Court to continuance at last term were set forth in a printed leaflet, copies whereof are submitted herewith. The situation therein recited still exists. The Legislative Committee therein mentioned was unable to conclude

its labors in time to make a report at the session of 1913, and an appropriation for its further service was made by the Legislature. The Chairman of the Committee now writes as follows:

> "The members of the Morris Canal Investigation Committee have been delayed in closing up the work imposed upon them by the resolution creating the committee by reason of the fact that more time was required in obtaining appraisements, etc., than we supposed would be necessary. However, we are pushing the work as rapidly as possible and you can feel assured that a report will be made at the next session of the Legislature. I assume that this will be satisfactory and that the cases will be postponed in accordance with our understanding."

The controversies pending in the State Courts have been continued, and it is advantageous to all parties that matters should remain in statu quo until this Legislative Committee can make its report. The next session of the New Jersey Legislature will be held January 13, 1914.

Respectfully submitted,

GILBERT COLLINS,

Of Counsel with Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
OCT 14 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1912~~ 1914

No. 1.

MORRIS CANAL & BANKING COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID BAIRD ET AL., STATE BOARD OF ASSESSORS OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE, DEFENDANTS IN ERROR.

REASONS FOR MOTION TO CONTINUE.

WM. I. LEWIS,
Of Counsel with Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 1.

MORRIS CANAL & BANKING COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID BAIRD ET AL., STATE BOARD OF ASSESSORS OF NEW JERSEY, AND J. WILLARD MORGAN, COMPTROLLER OF SAID STATE, DEFENDANTS IN ERROR.

REASONS FOR MOTION TO CONTINUE.

The plaintiffs in error move for a continuance of the above cause to the next stated term of this court for the following reasons:

Such continuance has been agreed to by the parties, the stipulation therefor has been signed by the attorney of the plaintiffs in error and by the Attorney General of New Jersey, attorney of defendants in error, and has been filed with the clerk of the court.

The case involves the validity of certain assessments of taxes by the State of New Jersey against the plaintiffs in error which approximate $750,000.

The present litigation is approaching a settlement, in manner following:

For some time negotiations have been pending between the Lehigh Valley R. R. Co., one of the plaintiffs in error, looking to the surrender of certain of its properties, rights, and privileges as lessee of the said Morris Canal & Banking Co. to the State of New Jersey, and the acquirement by the railroad company of certain riparian and other rights from the State of New Jersey. In the course of these negotiations the legislature of New Jersey, in the year 1911, appointed a commission, consisting of Governor Woodrow Wilson, the State's Attorney General, and former Justice of the New Jersey Supreme Court, Mr. Bennet Van Syckel, to report the terms for the settlement of the subject-matter of such negotiations. At the session beginning in January, 1912, the commission reported for the State a tentative agreement with the railroad, which, among other things, provided, as part of the consideration to move from the railroad, that the said railroad should release its errors in this cause, pay said taxes, and the parties should consent to the continuance of this cause until the legislature had acted upon the matters contained in said report.

Thereupon the legislature, desiring further information, appointed a new commission, which

consisted of the old commission, except Governor Wilson, and some new members. The legislative resolution provided for a speedy report to the next session or to a special session of the legislature to be called this year especially to consider the report of the new commission.

The new commission has done a great deal of work, and will be ready to report at the special session or, if it is not called, at the session of 1912; when, it is expected, the present litigation will be settled.

For these reasons the continuance is prayed for as aforesaid.

I may be permitted to say that the present motion is not made by Judge Collins, of the firm of Collins & Corbin, with whom I have been recently associated in this case, owing to a meeting of the bar of Hudson county, New Jersey, held today, to take action upon the occasion of Mr. Corbin's death, at which meeting Judge Collins has been requested by the bar to be present.

Respectfully submitted,

WM. I. LEWIS,
Of Counsel with Plaintiffs in Error.

MORRIS CANAL AND BANKING COMPANY *v.* BAIRD.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 1. Argued October 21, 1915.—Decided November 21, 1915.

A transfer, even though under legislative authority, of all the property and franchises of one corporation to another does not vest the latter with freedom from exercise of governmental power which the former enjoyed under its charter. *Rochester Railway* v. *Rochester*, 205 U. S. 236.

An express provision in a legislative charter limiting an exemption from taxation to such property as is possessed, occupied, and used by the company for the actual and necessary purposes for which it was chartered must be strictly construed under the settled rule that transfers do not carry the exemption even though, as in this case,

the State has reserved rights of purchase and eventual ownership of the property.

After property has been transferred by one corporation to another it is not possessed, occupied and used by the former, and an exemption from taxation during such possession, occupation and use no longer applies.

Taxes imposed by the State of New Jersey upon the lessee of the property of the Morris Canal and Banking Company *held* not to be unconstitutional as impairing the obligation of the contract of exemption contained in the charter of the company granted in 1824, that company having leased all of its property to the lessee and the exemption not being transferable and only applicable to property possessed, occupied and used by the canal company; and further *held* that the general rule was not affected in this case by the fact that the State reserved the power to purchase the property of the canal company within a specified period and that within a further specified period such property should become the property of the State.

76 N. J. Law, 627, affirmed.

THE facts, which involve the constitutionality under the contract clause and the construction of a taxing statute of New Jersey and the validity of a tax levied thereunder, are stated in the opinion.

Mr. Gilbert Collins for plaintiffs in error:

The contract of exemption from taxation was not a bounty conferred on any particular company, nor an agreement made merely in view of presumptive benefits to the people. It was a contract of exemption of certain specific property, for an adequate consideration, to wit, the conveyance of the property itself to the State, possession to be taken at the end of a term of years, the owner meantime to devote the property to public use on terms controlled by the State, and for other substantial considerations. *Barnett* v. *Johnson*, 15 N. J. Eq. 481.

The exemption from taxation was limited to the company's property essential to the canal use. *State* v. *Betts*, 24 N. J. L. 555; *Morris Canal* v. *Jersey City*, 12 N. J. Eq. 227; *Morris Canal* v. *Haight*, 35 N. J. L. 178; *Morris*

Canal v. *Love*, 37 N. J. L. 60; *Lehigh Valley R. R.* v. *Newark*, 44 N. J. L. 323; *Morris Canal* v. *Cleaver*, 46 N. J. L. 467. See also *New Jersey* v. *Wilson*, 7 Cranch, 164.

This case presents not only a full and adequate consideration, but has the further support that the property exempted is exempted because it is public property. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 654; *Ches. & Ohio R. R.* v. *Virginia*, 94 U. S. 726; *Central R. R. of Georgia* v. *Georgia*, 92 U. S. 670; *Powers* v. *Detroit &c. Ry.*, 201 U. S. 543; *Tennessee* v. *Whitworth*, 117 U. S. 129; *Humphrey* v. *Pegues*, 83 U. S. 244; *Philadelphia & Wilmington R. R.* v. *Maryland*, 10 How. 377; *Green County* v. *Conness*, 109 U. S. 104.

Cases in which the exemption was denied in the hands of the assignee company fall within four classes none of which included the case at bar:

Where the mortgage, lease or transfer was made without express statutory authority. *Memphis R. R.* v. *Commissioners*, 112 U. S. 609; *Ches. & Ohio R. R.* v. *Miller*, 114 U. S. 176; *Pickard* v. *East Tenn. R. R.*, 130 U. S. 637; *Mercantile Bank* v. *Tennessee*, 161 U. S. 161; *East Tenn. R. R.* v. *Camden Co.*, 102 U. S. 273; *Wilson* v. *Gaines*, 103 U. S. 417; *Louis. & Nash. R. R.* v. *Palmer*, 109 U. S. 244.

Where the corporation claiming the exemption was not created until a constitutional bar to exemption had been interposed. *Trask* v. *McGuire*, 18 Wall. 391; *Keokuk &c. R. R.* v. *Missouri*, 152 U. S. 301; *Atlantic &c. R. R.* v. *Georgia*, 98 U. S. 359; *St. Louis &c. R. R.* v. *Berry*, 113 U. S. 465; *Memphis &c. R. R.* v. *Berry*, 112 U. S. 609; *Minn. & St. Louis Ry.* v. *Gardner*, 177 U. S. 332; *Shields* v. *Ohio*, 95 U. S. 321; *Maine Cent. R. R.* v. *Maine*, 96 U. S. 509; *Yazoo & Miss. Valley Ry.* v. *Adams*, 180 U. S. 1, 18; *New York* v. *Cook*, 148 U. S. 406.

Where from surrounding words and circumstances it is apparent that the legislature did not intend the exemption to pass to the successor. *Phœnix Fire Ins. Co.* v. *Johnson*,

161 U. S. 174; *Chicago &c. R. R.* v. *Missouri*, 122 U. S. 561; *Wilmington &c. R. R.* v. *Allsbrook*, 146 U. S. 279; *Ches. & Ohio R. R.* v. *Miller*, 114 U. S. 176; *East Tenn. R. R.* v. *Camden Co.*, 102 U. S. 273; *Wilson* v. *Gaines*, 103 U. S. 417; *Citizens St. Ry.* v. *Memphis*, 53 Fed. Rep. 715; *Minot* v. *P. W. & B. R. R.*, 18 Wall. 206; *Bancroft* v. *Wicomico Co.*, 121 Fed. Rep. 874, aff'd 135 Fed. Rep. 977.

Where the intent to pass the immunity was not sufficiently clearly expressed. *Covington & Lexington R. R.* v. *Sanford*, 164 U. S. 578; *Norfolk & W. R. R.* v. *Pendleton*, 150 U. S. 673; *People's Gas Light Co.* v. *Chicago*, 194 U. S. 1; *St. Louis & San Fran. Ry.* v. *Gill*, 156 U. S. 656; *Morgan* v. *Louisiana*, 93 U. S. 217.

The reluctance of the courts to enforce contracts of exemption because relieving property from the common burden which public policy requires shall be equally borne, has no just application to the case now before the court. *Minot* v. *P. W. & B. R. R.*, 18 Wall. 206, 225.

The exemption from taxation passed to the lessee. *Boston & Lowell R. R.* v. *Salem & Lowell R. R.*, 68 Massachusetts, 1, 35.

This contract right should not be denied to the transferee, except on the theory that it is a bounty or personal immunity which the State has given to the grantor.

Mr. Robert H. McCarter, with whom *Mr. Edmund Wilson*, Attorney General of the State of New Jersey, was on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The Court of Errors and Appeals of New Jersey sustained a tax for the year 1906 levied by the State Board of Assessors, under the railroad and canal tax act of 1884 and supplements thereto, upon the canal and appurtenances leased by the Morris Canal and Banking Com-

pany to the Lehigh Valley Railroad. 76 N. J. L. 627. Plaintiffs in error claim the charter of the lessor company exempts the assessed property from taxation, and to subject it to the charge in question would impair the obligation of that contract contrary to the provisions of Article I, § 10, Federal Constitution.

The Morris Canal and Banking Company was incorporated by a special act of the New Jersey Legislature, passed December 31, 1824,[1] for the purpose of constructing a canal across the State. This statute expressly declared that "said canal when completed shall forever thereafter be esteemed a public highway," gave the State the right to purchase it after ninety-nine years at a fair valuation, and specified that it should become the sole property of the State after one hundred and forty-nine years; but no power was granted the corporation either to sell or lease its works. Section 4 provides:

"No state, county, township, or other public assessments, taxes or charges whatsoever shall at any time be laid or imposed upon the said canal company, or upon the stocks and estates which may become vested in them under this act; but this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation under this act, according to the true intent and meaning thereof; . . ."

An act approved March 14, 1871 (Acts, p. 444), amended the original charter as follows:

"It shall and may be lawful for the Morris Canal and Banking Company, by and with the consent of a majority in interest of the stockholders of the said company, expressed in writing and duly authenticated by affidavit,

[1] An act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers. Acts N. J. 1824, 158–160.

and filed in the office of the secretary of state, to lease the canal of said company, or any part thereof, with all or any of its boats, property, works, appurtenances and franchises, to any person or persons, or corporation, either perpetually or for such shorter time, and upon such rents and agreements, as may be agreed upon between the said contracting parties, and it shall be lawful for the lessee or lessees in said lease to use and enjoy the said property and franchises so demised, for the term in said lease mentioned."

By indenture dated May 4, 1871, the canal company undertook to let and demise to the Lehigh Valley Railroad its entire canal and navigation works, together with all corporate franchises, *rights and privileges*, other than that of being a corporation, to have and to hold unto the lessee, its successors and assigns, perpetually. (The words rights and privileges are not contained in the amendment to the charter.) Likewise it bargained and sold to the railroad all of its cars, trucks, boats, etc., and movable property of every kind and description except certain records and specified articles.

Admitting that the provision in the charter of 1824 granting exemption from taxation constituted a valid contract which subsequent legislation could not impair, the State maintains that it ceased to apply after the lease and sale to the railroad, and the property in question then became subject to assessment.

The doctrine essential to the solution of the question in issue was lucidly stated and the pertinent authorities cited in *Rochester Railway* v. *Rochester*, 205 U. S. 236, Mr. Justice Moody delivering the opinion. Speaking in respect of the transfer of an immunity from the exercise of governmental power granted by contract, he declared (p. 247):

"Although the obligations of such a contract are protected by the Federal Constitution from impairment by

the State, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the State may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits, to a successor. . . . But the State, by virtue of the same power which created the original contract of exemption, may either by the same law, or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken not by reason of the inherent right of the original holder to assign it, but by the action of the State in authorizing or directing its transfer. As in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed every doubt is resolved in favor of the continuance of the governmental power and clear and unmistakable evidence of the intent to part with it is required."

And, after a review of former opinions, the conclusion was reached that a transfer, under legislative authority, of "the estate, property, rights, privileges and franchises" of one corporation to another did not vest in the latter the freedom from exercise of governmental power which the former enjoyed under its charter.

The results in *Wright* v. *Central of Georgia Ry.*, 236 U. S. 674, and *Wright* v. *Louisville & Nashville R. R. Co.*, 236 U. S. 687, 690, were based upon the original charters, which were interpreted as contemplating and permitting subsequent transfers without subjecting the fee to taxation. Neither of these cases modifies the principles announced and applied in the opinion quoted from above—it is referred to with approval in the latter of them.

By express terms the charter of the Morris Canal and

Banking Company limited the exemption from taxation to such property "as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation." This language must be strictly construed under the settled rule, notwithstanding the rights of purchase and ownership secured by the State, the supposed value of which, it is claimed, was so unusual that a more liberal interpretation should be adopted. After transfer to the railroad the assessed property was not possessed, occupied or used by the canal company; and the exemption, therefore, no longer applied, unless some legislation plainly authorized or directed its transfer.

Only the act of March 14, 1871, can be relied upon to show such authorization or direction. But this merely permitted the lease of "the canal of said company, or any part thereof, with all or any of its boats, property, works, appurtenances and franchises;" and, as clearly pointed out in the *Rochester Case*, *supra*, an exemption from taxation does not pass under a valid lease or sale of corporate property together with appurtenances and franchises.

We find no error in the judgment of the court below, and it is accordingly

Affirmed.